



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

HEARSAY IN CIVIL AND CRIMINAL CASES

[LRC CP 60 – 2010]



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Full responsibility for this publication lies, however, with the Commission.

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INTRODUCTION

A Background to the Project

1. This Consultation Paper on the hearsay rule forms part of the Commission's *Third Programme of Law Reform 2008-2014*¹ and is one of three projects concerning aspects of the law of evidence. In 2008, the Commission published a *Consultation Paper on Expert Evidence*² and, in 2009, a *Consultation Paper on Documentary and Electronic Evidence*.³ Following its usual consultation process on these topics, the Commission intends to publish a composite Report which will deal with each of these three important aspects of the law of evidence in Ireland. The work on these related aspects of the law of evidence continues long-standing aspirations to move eventually towards a complete legislative framework or code on the law of evidence.⁴

B The Hearsay Rule and Key Principles in the Law of Evidence

2. One of the longest established principles of the law of evidence⁵ is that, in order to be admissible, any proposed evidence must be relevant to the

¹ See *Report on Third Programme of Law Reform 2008-2014* (LRC 86-2007), Project 8, which noted (p.12) that the Commission had previously examined this area of the law: see also paragraph 7, below.

² LRC CP 52-2008. See *Third Programme of Law Reform 2008-2014*, Project 11.

³ LRC CP 57-2009. See *Third Programme of Law Reform 2008-2014*, Project 7.

⁴ See the Minister for Justice's *Programme of Law Reform* (Pr. 6379, 1962), paragraph 26 (pp.13-14) (desirability of a comprehensive code); Law Reform Commission, *First Programme of Law Reform* (1977), paragraph 11 (pp.8-9) (similar aspiration); and Law Reform Commission, *Report on the Rule Against Hearsay in Civil Cases* (LRC 25-1988), p.1 (noting general agreement on the desirability of a code, pending which reform proposals for particular areas should be developed).

⁵ On Irish law see generally, Fennell, *Law of Evidence in Ireland* (3rd ed Bloomsbury Professional 2009), Healy, *Irish Laws of Evidence* (Thomson Round Hall 2004) and McGrath, *Evidence* (Thomson Round Hall 2005). A leading English text is Tapper, *Cross and Tapper on Evidence* (11th ed Oxford UP 2007). The leading American text, *Wigmore on Evidence* (4th ed, in 14 volumes and supplements, Wolters Kluwer Law 2005), was originally published as Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little Brown, 1904). The analysis in various editions of both *Cross* and *Wigmore* has been cited by courts in many common law countries, including Ireland.

issues being determined in a civil or criminal case; in other words, it must have what is called probative value, because the purpose of evidence is to build up the necessary basis on which to provide proof of the issues in dispute in a civil or criminal case.⁶ Another key principle is that, in general, evidence should be capable of being tested in court under oath, notably through cross-examination; so that if a specific piece of evidence is not capable of being tested in this way, it is likely to be deemed inadmissible, even if it appears to be relevant, that is, has probative value. In some respects the hearsay rule involves the competing application of these two principles. The leading decision of the Supreme Court on the hearsay rule, *Cullen v Clarke*,⁷ summarises the position as follows. The hearsay rule is a general rule, subject to many exceptions, that testimony given by a witness concerning words spoken, statements made or documents generated by a person who is not produced in court as a witness is inadmissible if the testimony is presented to prove the truth of the facts which they assert. The two main reasons given for this generally exclusionary approach are: the out-of-court statements cannot be tested by cross-examination and they are not made under oath. As the Supreme Court noted there are, however, a number of inclusionary exceptions to the hearsay rule, so that in some instances evidence may be admitted even where it is not subjected to cross-examination. The Supreme Court also emphasised that there is no general rule preventing a witness from testifying as to such out-of-court words, statements or documents if the testimony is not being presented to prove the truth of their content.

3. An example of the application of the hearsay rule would be where a person wishes to testify in a criminal trial about a statement he overheard being made by an untraceable person to the effect that the untraceable person said that she saw the accused fleeing the scene of the crime. If this testimony is being presented to prove that the statement by the untraceable person is true, the hearsay rule states that this is inadmissible as evidence.⁸

4. In addition to this example of the application of the rule to testimony about verbal out-of-court statements, the hearsay rule also applies to written out-of-court statements, such as letters or other types of documentary records (for example, a car manufacturer's record of chassis numbers entered by its car

⁶ McGrath, *Evidence* (Thomson Round Hall 2005), paragraph 1-01.

⁷ See in particular the judgment of Kingsmill Moore J in *Cullen v Clarke* [1963] IR 368, at 378, discussed at paragraph 2.04, below.

⁸ See the discussion of the English case *R v Gibson* (1887) 18 QBD 537 at paragraph 2.15, below.

assembly workers⁹) where the originator of the document is not available to testify in court as to its authenticity.

5. The general exclusionary approach of the hearsay rule is clear, but this is subject (as the Supreme Court noted in *Cullen v Clarke*) to many inclusionary exceptions, most of which were developed through judicial decisions, while others are set out in legislation. These exceptions to the hearsay rule have the effect that certain out-of-court statements are deemed admissible. A long-established common law example would be testimony given in court of an out-of-court “dying declaration”, but this inclusionary exception only applies in murder and manslaughter cases, and does not apply in any civil cases.¹⁰ An example of a statutory exception would be that, under the *Documentary Evidence Act 1925*,¹¹ public documents and records are deemed admissible, and this inclusionary exception applies to both civil and criminal proceedings. These inclusionary exceptions to the hearsay rule were developed on the basis that the statements or documents, even though they cannot be tested by cross-examination, are regarded as trustworthy and do not need to be tested because of the circumstances in which they were made or generated. While the Commission accepts that this approach can easily be applied to public documents, the Consultation Paper discusses to what extent other inclusionary exceptions, such as the “dying declarations” exception, retain their validity, whether in their current narrow sphere or in a wider setting.

6. In addition to the complexity arising from the existence of the inclusionary exceptions to the hearsay rule, the current law also gives rise to difficulties concerning, for example, whether certain evidence is to be regarded as original evidence or hearsay. Aspects of this problem are also discussed by

⁹ This was the background to one of the leading English decisions on the hearsay rule, *Myers v DPP* [1965] AC 1001, discussed at paragraphs 2.19ff, below, in which the UK House of Lords (since 2009, replaced by the Supreme Court of the United Kingdom) held that such records were inadmissible under the hearsay rule. Legislation was immediately enacted in England and Wales (the *Criminal Evidence Act 1965*) to reverse the effect of the *Myers* case and to make such records admissible, subject to certain safeguards. In Ireland, Part II of the *Criminal Evidence Act 1992*, which implemented recommendations made by the Commission in its *Report on Receiving Stolen Property* (LRC 23-1987) (see paragraph 8, below), takes a similar approach.

¹⁰ See paragraph 3.33, below.

¹¹ See generally the discussion in the Commission’s *Consultation Paper on Documentary and Electronic Evidence* (LRC CP 57-2009).

the Commission in its *Consultation Paper on Documentary and Electronic Evidence*.¹²

C The Commission's Previous Work on the Hearsay Rule, Recent Statutory Reform and Approach to the Current Project

7. The Commission previously examined the hearsay rule under its *First Programme of Law Reform*.¹³ In 1980, the Commission published a *Working Paper on the Rule Against Hearsay*¹⁴ which considered the application of the rule in both civil and criminal proceedings, but made recommendations for reform only as the rule applied in civil cases. This was followed by the Commission's 1988 *Report on the Rule Against Hearsay in Civil Cases*¹⁵ and, as is clear from its title, the 1988 Report was also confined to proposing reform in the context of civil proceedings only. The key recommendation in the 1988 Report was that, in civil cases, the hearsay rule should move from a, broadly, exclusionary approach to a, broadly, inclusionary approach.

8. The Commission acknowledged in the 1988 Report that reform of the rule was also required in criminal proceedings, but considered that it should proceed with proposals for civil cases as these had not given rise to any particular objections and that separate consideration was required before proceeding to reform the rule in criminal proceedings.¹⁶ In one important respect, however, the Commission had, in its 1987 *Report on Receiving Stolen Property*¹⁷ recommended reform of the hearsay rule in criminal proceedings. The background to this was that, in a 3-2 majority decision of the UK House of Lords in *Myers v DPP*,¹⁸ that Court had decided that business records were inadmissible in criminal cases under the hearsay rule as it applied in English law. While the Commission queried whether the *Myers* decision would have

¹² LRC CP 57-2009. See *Third Programme of Law Reform 2008-2014*, Project 7.

¹³ The *First Programme of Law Reform* ran from 1976 to 1999.

¹⁴ LRC WP 9-1980. In 1987, the Commission renamed Working Papers as Consultation Papers.

¹⁵ LRC 25-1988.

¹⁶ *Ibid.* at 1-2.

¹⁷ *Report on Receiving Stolen Property* (LRC 23-1987).

¹⁸ [1965] AC 1001. See the detailed discussion at paragraph 2.19ff, below.

been followed in Ireland,¹⁹ it recommended that there should be statutory reform to provide for the admissibility of business records in such cases.

9. The Commission's general recommendations in the 1988 Report for reform of the hearsay rule in civil proceedings have not yet been implemented by the Oireachtas,²⁰ but a specific recommendation concerning evidence by children was implemented in the *Children Act 1997*.²¹ In addition, the Commission's 1987 recommendation that business records be admissible in criminal proceedings was implemented in Part II of the *Criminal Evidence Act 1992*.²² The limited scope of these legislative reforms contributed to the inclusion of this project on the hearsay rule in the Commission's *Third Programme of Law Reform 2008-2014* (which was approved by Government in December 2007), and which commits the Commission to build on its previous work and to examine the hearsay rule as it applies in both civil and criminal proceedings.

10. In approaching the hearsay rule in this Consultation Paper, the Commission has considered separately its application in civil cases and criminal cases. As the Commission noted in its 1988 Report, while the principles underlying the exclusionary nature of the hearsay rule (notably, the inability to test such out-of-court statements by cross-examination) apply equally to both civil and criminal proceedings, proposed changes towards an inclusionary approach to the hearsay rule in civil proceedings would seem to be largely uncontroversial – indeed, they probably largely reflect current practice. By contrast, any comparable proposals for criminal trials must consider two overriding matters, as required by the Constitution and under international law: the need to give society the assurance that full confidence can continue to be placed on the reliability of criminal trial verdicts (in particular because of the potential loss of liberty that can often follow from a guilty verdict), and that the defendant continues to receive a trial in accordance with fundamental constitutional principles, in particular a trial in due course of law under Article 38.1 of the Constitution.²³

¹⁹ *Report on Receiving Stolen Property* (LRC 23-1987), paragraphs 29 (discussion of the law) and 144 (recommendation for reform), discussed in detail at paragraphs 5.07ff, below.

²⁰ The Commission understands that preparatory work on a Government *Civil Evidence Bill*, based on the Commission's draft Bill in the 1988 Report, had been initiated in the early 1990s, but that this did not proceed to the publication of a Bill.

²¹ See paragraph 4.11ff, below.

²² See paragraph 5.07ff, below.

²³ See generally, Hogan and Whyte, *Kelly: The Irish Constitution* (4th ed, Lexis Nexis 2003).

11. The Commission has also examined other constitutional requirements – and international human rights aspects – against which the hearsay rule, originally developed in a pre-constitutional setting, must now be considered. In particular, the Commission has considered the effect on the hearsay rule of the right to fair procedures under Article 40.3 of the Constitution.²⁴ In this respect, the Supreme Court has emphasised in a number of cases, including *Borges v Medical Council*,²⁵ that the use of hearsay may in some instances fail to comply with the constitutional right to fair procedures. The Court also noted in the *Borges* case, however, that it would not ignore the need “to ensure that the rule against hearsay is not so rigidly applied in every case as to result in injustice.”²⁶ This constitutional perspective on the hearsay rule indicates the need to avoid proposing a move towards a completely inclusionary approach to hearsay, while at the same time recognising that the Constitution does not require a rigid exclusionary approach. In reality, this constitutional perspective reflects the long history of the hearsay rule as an exclusionary rule with, as the Supreme Court noted in *Cullen v Clarke*,²⁷ “many inclusionary exceptions.” The Commission now turns to provide a brief overview of the Consultation Paper.

D Outline of the Consultation Paper

12. In Chapter 1 the Commission examines the historical evolution of the hearsay rule as, primarily, an exclusionary rule of evidence with, ultimately, many inclusionary exceptions. This includes an analysis of the original justifications developed at common law for this approach, which included the view that jurors could not be relied on to evaluate hearsay properly. This reason gradually became less frequently mentioned, so that by the 19th century, when the hearsay rule had developed to a point that remains recognisable in the early 21st century, two main reasons were mentioned. These were: the inability to cross-examine the original makers of hearsay statements, and that the statements were not made under oath.

13. In Chapter 2 the Commission examines the, broadly, exclusionary nature of the hearsay rule as it currently applies in Ireland, including the analysis

²⁴ See paragraph 2.67ff, below.

²⁵ [2004] IESC 9; [2004] 1 IR 103.

²⁶ [2004] IESC 9; [2004] 1 IR 103, 117. See the discussion at paragraphs 2.77-2.83, below.

²⁷ See Kingsmill Moore J in *Cullen v Clarke* [1963] IR 368, at 378, discussed at paragraph 2.04, below.

of the rule in the leading decision of the Supreme Court, *Cullen v Clarke*.²⁸ As already noted, this is based on the important point that the testimony involved is aimed at proving the truth of the facts contained in the out-of-court statement. The Commission then discusses the distinction between original evidence and hearsay, which also focuses on the purpose for which evidence is presented in court. The Commission then discusses the scope of the out-of-court statements that may constitute hearsay, including oral statements, documentary evidence, statements by conduct and implied assertions.

14. The Commission also examines in Chapter 2 two general principles of the law of evidence against which the hearsay rule is to be considered, notably the best evidence rule and the principle of relevance. The Commission then examines in detail how the concept of fair procedures under the Constitution of Ireland and the European Convention on Human Rights (and the related right to confront in criminal cases under the Constitution) has affected recent analysis of the hearsay rule. As already indicated, the constitutional perspective on the hearsay rule indicates the need to avoid proposing a move towards a completely inclusionary approach to hearsay, while at the same time recognising that the Constitution does not require a rigid exclusionary approach. On this basis, the Commission concludes in Chapter 2 that while a movement towards an inclusionary approach in civil cases may be appropriate, a more cautious approach in criminal cases ought to be taken.

15. In Chapter 3 the Commission examines the development of the inclusionary exceptions to the hearsay rule. The Commission discusses the emergence of the common law inclusionary exceptions to the hearsay rule, and some criticisms about the absence of any underlying basis for them. The Commission examines six inclusionary exceptions to the hearsay rule, most of which were developed judicially in court decisions. These are: admissions and confessions; spontaneous statements connected with the subject matter of the case (the *res gestae* rule); dying declarations (admissible only in a murder and manslaughter case); certain statements of persons since deceased (including statements by testators concerning the contents of their wills); public documents; and certain statements made in previous proceedings. The Commission provisionally recommends that these inclusionary exceptions be retained in the proposed legislative framework.

16. In Chapter 3, the Commission then discusses whether, assuming further statutory reform of the rule, there should be a continued role for judicial development of the rule, in particular the inclusionary exceptions. In some States, judicial decisions have expanded existing inclusionary exceptions and even the creation of entirely new ones. Irish courts have, in general, indicated a

²⁸

[1963] IR 368

reluctance to engage in any wide-ranging reform and have tended to suggest this is a matter for statutory development, but the Commission considers that a continuing judicial role, based on a discretion to include or exclude evidence, may be appropriate.

17. Having analysed the hearsay rule, including the inclusionary exceptions developed to date, the Commission then turns to examine proposed reforms. As already indicated, the Commission has given separate consideration to reform proposals as they apply to civil and criminal proceedings.

18. In Chapter 4 the Commission examines the current state of the hearsay rule in civil proceedings in Ireland and, in making provisional recommendations for reform, builds on the analysis and recommendations made in the 1988 *Report on the Rule Against Hearsay in Civil Cases*.²⁹ As already noted, the 1988 Report recommended that, in civil proceedings, the exclusionary rule of hearsay should be replaced with a, broadly, inclusionary approach. Chapter 4 also contains a comparative analysis of the law in other jurisdictions, where, in general, an inclusionary approach has also been taken (this had been the case before 1988, and has continued since then). The Commission notes that there are many different aspects of civil procedure which, by contrast with criminal procedure, have militated in favour of an inclusionary approach: these include the lower burden of proof (proof on the balance of probabilities, as opposed to proof beyond reasonable doubt), the availability of discovery of documents in civil proceedings, the diversity of the forms of civil proceedings, the variety of forms of relief being claimed and the virtual absence of juries in civil trials in Ireland. The Commission concludes the chapter with its provisional recommendations for reform, based on a move towards a general inclusionary approach to hearsay in civil proceedings.

19. In Chapter 5, the Commission considers the operation of the hearsay rule in criminal proceedings. As already noted, in Part II of the *Criminal Evidence Act 1992*, the Oireachtas has legislated for an inclusionary approach to business records as documentary hearsay, subject to specific procedural safeguards (implementing the recommendation to that effect in the Commission's 1987 *Report on Receiving Stolen Property*).³⁰ In Chapter 5, the Commission assesses whether more wide-ranging reform is required. As in the case of the analysis of the hearsay rule in civil proceedings, the Commission conducts a comparative analysis of reform in other jurisdictions, where a move towards an inclusionary approach has occurred in some States. The Commission notes, however, that special aspects of criminal proceedings merit a cautious approach to reform. Two aspects in particular are notable: the higher

²⁹ LRC 25-1988.

³⁰ *Report on Receiving Stolen Property* (LRC 23-1987).

standard of proof that applies (proof beyond a reasonable doubt, as opposed to proof on the balance of probabilities), which ensures that society can have full confidence in the reliability of criminal trial verdicts; and the potential loss of liberty for an accused arising from a criminal conviction. This reinforces the importance of the general right to test evidence by cross-examination. For these reasons in particular the Commission concludes that, in criminal proceedings, the hearsay rule should continue to operate on an exclusionary basis, subject to existing inclusionary exceptions (common law and statutory) which should be placed within a coherent legislative framework.

20. Chapter 6 is a summary of the Commission's provisional recommendations.

21. This Consultation Paper is intended to form the basis of discussion and therefore all the recommendations are provisional in nature. The Commission will make its final recommendations on the subject of the hearsay rule in civil and criminal cases following further consideration of the issues and consultation. As already mentioned, the Commission intends to publish a composite Report which will deal with hearsay as well as the other two aspects of the law of evidence, expert evidence and documentary evidence, on which it has recently published Consultation Papers. Submissions on the provisional recommendations included in this Consultation Paper are welcome. To enable the Commission to proceed with the preparation of the Report, those who wish to do so are requested to make their submissions in writing to the Commission or by email to info@lawreform.ie by **31 May 2010**.

CHAPTER 1 HISTORICAL DEVELOPMENT OF THE HEARSAY RULE

A Introduction

1.01 In this Chapter the Commission examines the historical development of the hearsay rule as, primarily, an exclusionary rule of evidence, to which were ultimately attached a number of inclusionary exceptions. In Part B the Commission discusses the early historical background to the rule to the end of the 18th century, including the key reasons advanced for the rule during that period. In Part C, the Commission focuses on how the rule developed in the 19th century, when the key common law inclusionary exceptions were developed. This historical analysis also contains some precursors to the right-based approach which came to feature in the analysis of the hearsay rule during the 20th century, which the Commission discusses in detail in Chapter 3.

B Early Development of the Exclusionary Hearsay Rule

1.02 As noted in the Introduction to this Consultation Paper, the hearsay rule generally operates to prohibit a witness from reporting a statement made by another person where the truth of any fact asserted in that statement is incapable of being tested in court. It has been said that, next to trial by jury, there is, perhaps, nothing more well-established in the Anglo-American law of evidence than the hearsay rule and that the rule prohibiting the use of hearsay is intimately associated with an adversarial approach to litigation.¹ The origins of this approach may be traced back to the early 13th Century where the need to exclude hearsay was first recognised.² The rule evolved as the courts came to regard oral testimony by witnesses, who could be cross-examined on their testimony, as essential to a fair trial. Statements were proffered as evidence of the truth asserted within them, but where this truth could not be tested in the course of the trial they came to be regarded as inadmissible and were excluded on the basis of being hearsay. The emerging view of the courts was that the

¹ Wigmore *Evidence in Trials at Common Law* (3rd ed Little Brown & Co., 1974) at 20-28.

² Turner *Kenny's Outlines of Criminal Law* (19th ed Cambridge University Press, 1966) at 565.

witness must be available in court to be subjected to cross-examination. Courts grew more reluctant to be content with “second best” evidence as judges were aware of the danger that evidence retold by a secondary source may have become garbled, so that possible error, especially in a criminal trial, might arise.³

1.03 The reasons given for excluding hearsay evidence from a trial were varied, but three can be noted.⁴ First the maker of the hearsay statement could not be cross-examined and the decider of fact did not have an opportunity to observe the demeanour of the person making the statement at the time it was made. Secondly, the evidence was not regarded as relevant to a substantive issue or a credibility issue. Thirdly, hearsay evidence was not admitted as to do so would compromise the fairness of the trial.

1.04 While it may be suggested that the hearsay rule can be explained on the basis that it excludes presumptively unreliable evidence,⁵ there is no conclusive view as to the predominant rationale for the rule. As Tapper observes:

"No aspect of the hearsay rule seems free from doubt and controversy, least of all its history. Legal historians are divided between those who ascribe the development of the rule predominantly to distrust of the capacity of the jury to evaluate it, and those who ascribe it predominantly to the unfairness of depriving a party of the opportunity to cross-examine the witness."⁶

1.05 Legal historians such as Maine and Thayer were of the opinion that all the exclusionary rules of evidence owed their origin to the presence of the jury. The practice of using a jury (originally a jury of 24 men) started to appear in England around the year 1122 under the reign of Henry I, where the accusatorial system was based on trial by jury of a citizen's complaint.⁷ The

³ Williams *The Proof of Guilt: A Study of the English Criminal Trial* (3rd ed Stevens & Sons, 1963) 195 -196.

⁴ These are discussed in detail in Chapter 2, at paragraphs 2.14ff, below.

⁵ It has been said that it is largely because of the increased dangers of impaired perception, bad memory, ambiguity and insincerity along with the decreased effectiveness of traditional safeguards that hearsay is regarded as particularly vulnerable so as to require a special exclusionary rule: Tapper *Cross and Tapper on Evidence* (9th ed Butterworths 1999) at 532.

⁶ Tapper *Cross and Tapper on Evidence* (8th ed Butterworths, 1995), at 565.

⁷ In much of the rest of Europe, criminal trials using an inquisitorial approach became the standard.

members of the jury would be the residents of the neighbourhood with which the case was concerned, and were expected to supplement their local knowledge of the case by making further inquiries and conducting informal investigations of those with special knowledge of the facts. Verdicts could be (and were) based on the jury's special knowledge. Much of the evidence that juries relied on would have been hearsay evidence and there was no rule to prohibit the use of such evidence.⁸

1.06 Witnesses, as understood in the modern trial process, were largely unknown until the 16th century. It was around this time that verdicts began to be based on the evidence given orally in court during the course of the trial rather than being based on the jury's own knowledge or their own inquiries. This fact was recognised by the statute *5 Eliz I, c 9*, of 1562-63 which provided a compulsory process for witnesses⁹ and the notion of the hearsay rule as a distinct concept also began in the 16th century. By that time testimony of witnesses had become the principal source of proof.¹⁰ Persons called as witnesses were often pre-appointed and would confer in private with the jury, in effect comprising one body, and the witnesses did not regularly testify in open court.¹¹ Therefore the ordinary witness as we today conceive him or her, giving evidence in open court and publicly informing the jury, was a rare occurrence.¹²

1.07 The second phase in the development of the rule excluding hearsay ranged from the mid 16th century to the end of the 17th century. While hearsay evidence was still admissible, concern about its admission at trial grew. In the trial of Sir Walter Raleigh in 1603 for conspiracy to commit treason, the basis of his conviction included two pieces of hearsay evidence including an out-of-court

⁸ Choo *Hearsay and Confrontation in Criminal Trials* (Clarendon Press Oxford, 1996) at 7.

⁹ Wolchover "Criminal Trials: Proof by Missing Witness an Election Issue? - The Rule Against Hearsay" (1987) 137 *New Law Journal* 525.

¹⁰ Thayer *A Preliminary Treatise on Evidence at Common Law* (1898) at 53-65. Wigmore, a leading American text, states that "during the 1500s the community was for the first time dealing with a situation in which the jury depended largely, habitually and increasingly for their sources of information upon testimonies offered to them in court at the trial." Wigmore *Evidence in Trials at Common Law* (3rd ed Little Brown & Co., 1974) at 15.

¹¹ Wigmore "The History of the Hearsay Rule" (1904) 17 *Harvard Law Review* 437, 440.

¹² *Ibid* at 439.

statement of Lord Cobham, his alleged co-conspirator.¹³ In time, an exclusionary rule developed to control the circumstances in which hearsay was admitted because hearsay came to be considered inherently unreliable. Before the end of the 17th century there had been a number of English court decisions rejecting hearsay. In 1688 a hearsay statement made under oath was rejected because “the other party could not cross-examine the party sworn, which is the common course”¹⁴ and in *R v Paine*¹⁵ the Court of King's Bench excluded sworn depositions of a witness since deceased. Thus by the latter half of the 17th century hearsay evidence was only received after direct evidence had been given, and merely to corroborate it, and was not admissible of itself.¹⁶ Inevitably, attention began to be paid to the nature of evidence and objection made to hearsay, but it was not until the second half of the 17th century that the rule came to be conceded.¹⁷

1.08 In spite of the growing trend to exclude hearsay evidence from the trial process, an examination by Landsman of records describing criminal proceedings in London's Old Bailey (the Central Criminal Court) from 1717-1793 demonstrates that, in the early part of this period, hearsay evidence was admitted regularly with both verbal and written materials used with little restraint. The changes that commenced from the 1730s were gradual and the treatment by the court, even within a single case of hearsay evidence, may be at odds, with one sort of hearsay being excluded while another sort was admitted without question.¹⁸ Sometimes, instead of disapproving hearsay, the court was content merely to establish that the testimony was based upon hearsay.¹⁹ The trial judge would establish the hearsay character of the evidence, by which to allow its weakness and affect its credit in the eyes of the

¹³ Choo *Hearsay and Confrontation in Criminal Trials* (Clarendon Press Oxford, 1996) at 4.

¹⁴ See Morgan “Hearsay Dangers and the Application of the Hearsay Concept” (1948) 62 *Harvard Law Review*. 177, 182 fn.7; Choo *Hearsay and Confrontation in Criminal Trials* (Clarendon Press Oxford, 1996) at 5.

¹⁵ (1696) 5 Mod. 163; 87 ER 584.

¹⁶ Turner *Kenny's Outlines of Criminal Law* (Cambridge University Press, 19th ed, 1966) at 499.

¹⁷ Wolchover “Criminal Trials: Proof by Missing Witness an Election Issue? - The rule against hearsay” (1987) 137 *New Law Journal* 525.

¹⁸ Landsman “The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England” (1990) 75 *Cornell Law Rev* 497, 567.

¹⁹ Langbein “The Criminal Trial before the Lawyers” (1978) 45 *U. Chi. L. Rev.* 263, 302.

jury, rather than to exclude it from the jury as one would expect under the modern hearsay rule. Langbein noted that:

“Old Bailey judges knew that there was something wrong with hearsay, but even as late as the 1730s they do not appear to have made the choice between a system of exclusion or one of admissibility with diminished credit. Even when they disapproved of hearsay, calling it ‘no evidence,’ the judges did not give cautionary instructions to the jury to disregard the hearsay as we would require today. Nor was the jury sent from the courtroom in the modern fashion while the judge previewed evidence in order to decide whether to admit it”.²⁰

1.09 The 18th century has been described as the “century of consolidation”²¹ and although commentators writing in the early years of the century expressed a degree of caution on the status of the hearsay rule, by mid-century the courts treated the hearsay rule as an established part of the law. In the early years of the 18th century, hearsay evidence appeared to be admitted regularly²² and the move to exclude hearsay evidence from trials was gradual.²³ Landsman’s research shows that at the close of the 18th century a more sophisticated rule was being applied in an ever-increasing range of cases.²⁴

C Developments in the 19th Century

1.10 By the 19th century the hearsay rule had become well established and the emphasis was to move to the creation of exceptions to counteract the inflexibility of the original rule. The emerging exceptions would create a further difficulty in interpreting the rule because, rather than attempting to effect a wholesale rationalisation of the rule in a principled manner, the courts appeared

²⁰ Langbein “The Criminal Trial before the Lawyers” (1978) 45 *U. Chi. L. Rev.* 263, 302.

²¹ Choo *Hearsay and Confrontation in Criminal Trials* (Clarendon Press Oxford, 1996) at 5.

²² Landsman “The Rise of the Contentious Spirit: Advocacy Procedure in Eighteenth Century England” (1990) 75 *Cornell Law Review* 497.

²³ For an illustration of how the hearsay rule was applied by the courts in individual cases during the early part of the 18th century see Landsman “The Rise of the Contentious Spirit: Advocacy Procedure in Eighteenth Century England” (1990) 75 *Cornell Law Review* 497 at 566-569.

²⁴ *Ibid* at 572; see also Choo *Hearsay and Confrontation in Criminal Trials* (Clarendon Press Oxford, 1996) at 7.

to be preoccupied with the need to formulate exceptions out of convenience and to ameliorate the rule's perceived harshness.

(1) Reasons for the development of the hearsay rule

1.11 The generally accepted view is that the hearsay rule had taken root by the end of the 17th century, two centuries after the materialisation of the modern trial of proof by witness testimony.²⁵ The reason why the rule became entrenched is a matter for speculation and although many reasons for the rule have been put forward it is difficult to identify with precision which of them directly influenced the judges who established and moulded the rule. The American writer Wigmore attributed the development of the hearsay rule to a gathering mistrust of the jury's ability to evaluate hearsay evidence.²⁶ Morgan attributed it to the perceived need to test assertions by effective cross-examination.²⁷ The English legal writer Holdsworth proposed that two factors may be directly responsible. The first was Coke's strong condemnation of "the strange conceit... that one may be an accuser by hearsay".²⁸ The second factor affecting the establishment of the rule, according to Holdsworth, was the desire to provide some protection to compensate for the failure of the law in England to develop a system of proof of the same kind as the requirement of two witnesses in many of the Civil Law legal systems of Continental Europe.²⁹ A further reason

²⁵ By the middle of the 18th century, the jury had lost its original character completely and had become similar to the jury familiar to present cases; a body of triers of fact whose verdict must rest exclusively upon evidence given in court. This evidence was, as it now is, presented almost, if not quite, exclusively by the parties.

²⁶ Wigmore *Evidence in Trials at Common Law* (3rd ed Little Brown & Co., 1974) at 29.

²⁷ Morgan *Some Problems of Proof under the Anglo-American System of Litigation* (1956) at 117.

²⁸ Coke's *Institutes of the Laws of England* (1797 edition; originally written in 1628-1644) Vol 3, at 25. This followed the views of Gilbert, *The Law of Evidence* 152 (2nd ed 1760; written before 1726) who wrote: "The attestation of the witness must be to what he knows, and not to that only which he hath heard, for mere hearsay is no evidence; for it is his knowledge that must direct the Court and Jury in the judgment of the fact, and not his mere credulity... Besides, though a person testify what he hath heard upon oath, yet the person who spake it was not upon oath; and if a man had been in Court and said the same thing and had not sworn it, he had not been believed in a court of justice."

²⁹ Holdsworth *A History of English Law* (1926) Vol 9, pp.217-218.

for the consolidation of the hearsay rule was the emerging importance placed on evidence being given on oath.

(a) Distrust of the jury's ability to evaluate hearsay evidence

1.12 One of the reasons advanced for preserving the hearsay rule was that jury members as non-lawyers were not familiar with sifting evidence and a danger remained that a jury might give untested hearsay evidence the same probative force as direct evidence. Originally it was believed that certain forms of evidence had a particular propensity to confuse and mislead jurors and for that reason hearsay statements were excluded; to include them would divert jurors from their proper task. It was generally believed that juries could not be expected properly to weigh up the reliability of hearsay on a case by case basis, and it was deemed preferable that a blanket ban on such evidence should be maintained³⁰.

1.13 During the 19th century the concern was particularly prevalent about the ability of juries to handle hearsay evidence and its influence on hearsay doctrine is still evident in criminal proceedings in the 21st century. Choo notes that in jurisdictions where the mode of trial is the same in civil and criminal proceedings, the hearsay rule is largely the same but, in the Civil Law legal systems of Continental Europe, where very little reliance is placed on jury trial, the hearsay rule is not as significant.³¹ On the other hand Williams was dismissive of the traditional distrust and paternalism towards juries.³² He pointed out the absurdity of, on the one hand, entrusting to a jury the substantial task of following a trial where its members are credited with following technical and subtle directions to dismiss evidence from consideration and yet, on the other hand, are regarded as incapable, even with the assistance of the judge's directions, of attaching the necessary degree of importance to hearsay. Studies differ as to whether juries fully understand the directions as to the law which they are given and there are precedent directions on hearsay in some

³⁰ Scallan 'Constitutional Dimensions of Hearsay Reform: Towards a Three Dimensional Confrontation Clause' (1992) 76 *Minnesota Law Review* 623,627, n. 15.

³¹ Choo *Hearsay and Confrontation in Criminal Trials* (Clarendon Press Oxford, 1996) at 34.

³² Williams *The Proof of Guilt: A Study of the English Criminal Trial* (3rd ed 1963) at 207.

jurisdictions to avoid the potential difficulty.³³ While juries may use hearsay intelligently in ordinary life, it has been argued that a trial is “a proceeding in which finding the truth may require an understanding of institutional practices with which they have little or no dealings”.³⁴

(b) The emergence of oral testimony at trial

1.14 A characteristic feature of court proceedings in Ireland, as a common law State, is that much evidence is delivered orally by witnesses with relevant firsthand knowledge of the matters in issue. A common justification for the system of giving evidence by oral testimony, including the hearsay rule, is that seeing the demeanour and hearing the evidence of a witness in the witness box is the best means of getting at the truth. Whilst today oral witness testimony is often supplemented by documentary, physical or scientific evidence, it still remains a definitive part of the trial process. In the UK Privy Council decision *Teper v R*³⁵ Lord Normand stated that, without the witness being present in court to give an account of his evidence, “the light which his demeanour would throw on his testimony is lost”.³⁶ In the earlier English case *R v Collins*³⁷ Humphreys J referred to “the one great advantage to which those who uphold the system of trial by jury always point - of the opportunity of not only seeing the witnesses who give evidence and hearing what they have to say, but also of observing their demeanour in the witness-box”.³⁸

1.15 In spite of this praise for the tradition of giving evidence by live oral testimony, there is much judicial, academic and psychological scepticism about the weight that even seasoned observers of witnesses should attach to the impressions they form of them in the witness box.³⁹ In 1924, in the English case

³³ See Law Commission for England and Wales *Report: Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997) LC 245. On jury directions in Ireland generally, see Coonan and Foley, *The Judge’s Charge in Criminal Trials* (Round Hall 2008).

³⁴ Park ‘A Subject Matter Approach to Hearsay Reform’ (1987) 86 *Michigan Law Review* 51, 60-61. See also Mueller ‘Post Modern Hearsay Reform: The Importance of Complexity’ (1992) 76 *Minnesota Law Review* 367, who also argued that any changes in the hearsay rule should be undertaken with caution given the inherent differences between a trial and everyday life.

³⁵ [1952] AC 480.

³⁶ *Ibid* at 486.

³⁷ (1938) 26 Cr App R 177.

³⁸ *Ibid* at 182.

³⁹ Auld, *Review of the Criminal Courts of England and Wales* (2001) at 11.79.

*Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants Marine Insurance Co (The Palitana)*⁴⁰ Atkin LJ stated:

“As I have said on previous occasions, the existence of a lynx-eyed Judge who is capable at a glance of ascertaining whether a witness is telling the truth or not is more common in works of fiction than in fact on the Bench, and, for my part, I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.”

1.16 In Ireland, these comments by Atkin LJ have been cited with approval by Hardiman J in two Supreme Court decisions, *J O’C v Director of Public Prosecutions*⁴¹ and *O’Callaghan v Mahon*.⁴²

1.17 Psychological research tends to show that this sceptical attitude is correct – one consideration should be that the witness is a stranger to the judge and jury and hence there is less likelihood of the witness being detected as a liar; and judges and jurors are capable of being “taken in”. The English Law Commission, in its 1995 *Consultation Paper on Evidence in Criminal Proceedings*, found it difficult to come to a provisional conclusion in answer to the contention that a major shortcoming of hearsay evidence is that a trier of fact (whether a judge or jury) is deprived of the opportunity to observe a witness’s demeanour. Its provisional conclusion was that it was not so significant a factor in itself as to justify the exclusion of hearsay evidence. Warnings to the jury could draw jurors’ attention to the fact that they had not seen the witness give evidence, or how he or she would have stood up to cross-examination. This provisional conclusion became a recommendation in the Law Commission’s subsequent 1997 *Report on Evidence in Criminal Proceedings*,⁴³ whose main recommendations were implemented in the English *Criminal Justice Act 2003*. The Law Commission in its 1997 Report noted that a minority of consultees disagreed with its provisional finding and believed it to have

⁴⁰ (1924) 20 LI L Rep 140, at 152. See also to the same effect the comments in 1987 of Lord Roskill during a legislative debate in the UK House of Lords: “The picture of the lynx eyed judge who can always detect truth from falsity at a glance is not one which I ever would have claimed for myself.” *Hansard* (HL) 20 October 1987, vol 489, col 82, quoted in Law Commission *Report on Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997) LC 245.

⁴¹ [2000] 3 IR 478 at 508.

⁴² [2006] 2 IR 32 at 60.

⁴³ Law Commission *Report on Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997) LC 245.

underestimated the importance of a witness's demeanour. The Law Commission was not persuaded to change its provisional recommendation but stated that it was a matter that merited a warning from the judge.⁴⁴

1.18 In his 2001 *Review of the Criminal Courts of England and Wales* Lord Justice Auld concluded that he agreed with the Law Commission that oral testimony and seeing the demeanour of the witness on its own is not so significant as to justify the exclusion of hearsay. He stated that he would "join... a growing band of... distinguished jurists who, on the whole, doubt the demeanour of a witness as a reliable pointer to his honesty".⁴⁵

1.19 The value of live oral testimony may be overemphasised and it can no longer be assumed that oral testimony is the most significant source of information for the fact-finder in every case.⁴⁶ It nonetheless remains a significant part of the trial process. Wellborn, in a review of psychological literature on the accuracy of oral testimony, concluded that accuracy is an important factor in acceptability, but it is only one factor, and he stated that 'live testimony may be essential to the perception of fairness, regardless of the real relationship between live testimony and the accuracy of outcomes.'⁴⁷

(c) The need to test evidence through cross-examination

1.20 Cross-examination has been described as "the most effective method for testing a witness's evidence".⁴⁸ It is considered to lie at the heart of the distinction between testimonial and hearsay evidence⁴⁹ and it has been suggested that it is the objection to hearsay most strongly pressed today.

⁴⁴ *Ibid* at 3.12.

⁴⁵ Report of Lord Auld *Review of the Criminal Courts of England and Wales* (2001) at 11.79. See also Lord Bingham, *The Business of Judging* (OUP, 2000) and Lord Bingham "The Judge as Juror: The Judicial Determination of Factual Issues" (1985) 38 *Current Legal Problems* 1.

⁴⁶ Roberts *Criminal Evidence* (Oxford University Press 2004) at 212.

⁴⁷ Welborn "Demeanour" (1991) 76 *Cornell LR* 1075, 1092.

⁴⁸ Zuckerman *The Principles of Criminal Evidence* (Oxford University Press 1989) at 93.

⁴⁹ Choo *Hearsay and Confrontation in Criminal Trials* (Clarendon Press Oxford, 1996) at 32.

1.21 Indeed, this was a key reason given in the leading Supreme Court decision on the hearsay, *Cullen v Clarke*.⁵⁰ This was echoed by the Commission in the 1980 *Working Paper on the Rule Against Hearsay*, where it was noted that the lack of a mechanism to examine the credibility of a witness is one of the main objections to the reception of out-of-court statements.⁵¹

1.22 This principle originated in ancient Rome⁵² but in the Civil Law legal systems of Continental Europe it was greatly attenuated in early mediaeval times and the procedure of the Inquisition depended heavily on evidence given secretly by anonymous witnesses whom the suspect was denied the opportunity to confront. As already noted, in England, there was a period of departure from the common law rule of confrontation notably in the Court of Star Chamber and in common law trials for treason, such as in the 1603 trial of Sir Walter Raleigh.⁵³ The Court of Star Chamber was abolished in 1641, and steps were taken to bring the procedure of treason trials into line with that required at common law.

1.23 The right of the accused in a criminal trial to cross-examine witnesses is, today, an internationally recognised fundamental right. It is also referred to as the right of confrontation and was enshrined as the Sixth Amendment to the Constitution of the United States. In Chapter 2, the Commission discusses the case law on the Sixth Amendment, and comparable Irish case law on the right to confront under the Constitution of Ireland and the European Convention on Human Rights.⁵⁴

1.24 The argument advanced that cross-examination is the best method to test the veracity of evidence is arguably not as significant today as it was at a time when the modern jury trial was in its infancy, where the role of the juror and the witness was conflated and needed to be separated. Today, especially in civil proceedings in Ireland, the vast majority of cases are conducted without a jury and a more literate and technologically advanced society provides, and depends on, more reliable methods of keeping track of what has happened than

⁵⁰ [1963] IR 368, at 378, discussed at paragraph 2.04, below. See also the English Law Commission's 1997 *Report on Evidence in Criminal Proceedings: Hearsay and Related Topics* (LC 245), at 3.15.

⁵¹ Law Reform Commission *Working Paper on the Rule Against Hearsay* (LRC WP No.9-1980) at 193.

⁵² See Lusty "Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials", (2002) 24 *Sydney Law Review* 361, 363-364.

⁵³ See paragraph 1.07, above.

⁵⁴ See paragraphs 2.84ff, below.

can possibly be provided by the unassisted recollection of witnesses, even if their account of events is exposed to the rigour of cross-examination.⁵⁵ There are undoubtedly some cases in which cross-examination provides a means of arriving at a sound evidential basis for establishing proof in a specific setting. The Commission acknowledges, however, that cross-examination has its limits and that, in this respect, the absence of the ability to cross-examine a witness cannot in all cases justify the exclusion of all hearsay – if this was the case, there would, of course, be no exceptions to the exclusionary hearsay rule (and, as is clear from the discussion in Chapter 2, below, the case for such inclusionary exceptions has been acknowledged in the case law which has taken account of the right to confront in the US Constitution, the right to fair procedures in the Constitution of Ireland and the comparable provisions in the European Convention on Human Rights).

1.25 In conclusion, bearing in mind these comments and reservations, it is sufficient that the Commission notes that the right to cross-examine is one of the foundations for the hearsay rule and that the right of confrontation forms an important component of the criminal trial under the Irish Constitution and at common law.

(d) Historical reliance on the oath

1.26 One of the reasons advanced as to why a statement that is hearsay is deemed to be unreliable is because it is not made on oath in court. The oath historically had a central place in a system of justice; it stood for allegiance to the authority of the church and state and it was based on the belief that God would punish a liar. For that reason the idea persisted that oaths were an effective way to make witnesses tell the truth or face eternal damnation; thus it was viewed as a powerful disincentive to perjury. The religious character of the oath therefore meant that it embodied the “*highest possible security which men in general can give for the truth of their statements*”.⁵⁶ In time, the idea of divine retribution was supplanted by the idea that the effect the oath would have on the conscience of the witness was the law’s best mechanism to ensure the witness spoke the truth.⁵⁷ It is accepted that “for many modern persons, devoutly religious though they may be, the decline of belief in hell or divine

⁵⁵ Tapper *Cross and Tapper on Evidence* (9th ed Butterworths 1999) at 535.

⁵⁶ Whitcombe, *An Inquiry into Some of the Rules of Evidence Relating to the Incompetency of Witnesses* (London, 1824), 39.

⁵⁷ See Law Reform Commission *Report on Oaths and Affirmations* (LRC 34-1990), paragraph 2.7.

punishment makes the... traditional basis of the oath inapplicable".⁵⁸ Nonetheless the taking of an oath or affirmation may at least have the effect of making witnesses more cautious when giving their testimony than they may otherwise be.

1.27 McGrath notes that the oath as a factor in the development of the hearsay rule can hardly have been decisive because it was decided at an early point that hearsay statements were to be excluded even if they were sworn.⁵⁹

1.28 A general consideration of the oath falls outside the scope of this Consultation Paper. The Commission considered this in detail in its 1990 *Report on Oaths and Affirmations*⁶⁰ and in this Consultation Paper the Commission intends to confine its discussion of the oath to an overview of the effect it had on the development of the hearsay rule.

(e) *The emergence of the exceptions to the hearsay rule*

1.29 By the beginning of the 19th century, the hearsay rule had become well established and the emphasis shifted to definition of its range and the creation of exceptions to the rule.⁶¹ Landsman comments that, in their consideration of the range of the rule, the English courts appeared to adopt a more expansive test that treated a broader range of conduct as hearsay. This broader rule was expressed in *Wright v Doe d. Tatham*⁶² where the act of letter writing offered to show the sanity of the writer's state of mind was held to be hearsay. In this case, an heir at law sought to set aside the testator's will on the ground that the testator was mentally incompetent at the time he made the will. The beneficiary attempted to prove the testator's competency by offering several letters written to the testator. The case turned on the admissibility of three letters to the testator long before his death in order to prove that he had been mentally competent when making his will and a codicil to the will several years later. The decision in *Wright v. Doe d. Tatham* to exclude this as hearsay was followed in Ireland in 1867 in *Gresham Hotel Co. (Ltd.) v Manning*.⁶³ This was also a civil case, concerning whether an obstruction of light was caused by the construction by the plaintiff company of what remains a landmark hotel in

⁵⁸ New South Wales Law Reform Commission Discussion Paper *Oaths and Affirmations* (1980) paragraph 1.12.

⁵⁹ McGrath *Evidence* (Thompson Roundhall 2005), at 5-09.

⁶⁰ Law Reform Commission *Report on Oaths and Affirmations* (LRC 34-1990).

⁶¹ Tapper *Cross and Tapper on Evidence* (8th ed Butterworths, 1995), at 566.

⁶² (1838) 7 Eng Rep 559.

⁶³ (1867) Ir R 1 C L 125.

Dublin. The court excluded complaints by potential customers as hearsay testimony.

1.30 During this phase of the development of the hearsay rule, two alternative approaches of how hearsay evidence should be treated were advanced: one was that all hearsay should be excluded, subject to inclusionary exceptions; while the other was that relevant evidence should be admitted, subject to exclusionary exceptions.⁶⁴ The primarily exclusionary approach prevailed, but the 19th century also saw the introduction of many inclusionary exceptions through judicial developments and these had become well established by the end of the century.⁶⁵ The Commission discusses the inclusionary exceptions to the hearsay rule in greater detail in Chapter 3, but it is sufficient to note here that it is evident that, as the rule developed, its strict exclusionary approach posed difficulties for the courts in individual cases and, as a consequence, the inclusionary exceptions were developed, admittedly in a gradual and piecemeal manner. It equally appears clear that there was no overarching principle or justification to determine why certain exceptions were created. Instead, courts appeared to take a pragmatic case-by-case approach (a common phenomenon during the 19th century, in England in particular) in which a decision was made that a specific piece of hearsay evidence was sufficiently cogent to merit its admission in the case at hand. Over time, these individual decisions became inclusionary exceptions. These judicially developed inclusionary exceptions were supplemented by, equally piecemeal, statutory exceptions to the rule. Thus, a number of *Evidence Acts*, including the *Evidence Act 1851*, were enacted to provide that certain public documents were to be regarded as admissible.⁶⁶

⁶⁴ Tapper *Cross and Tapper on Evidence* (8th ed Butterworths, 1995) at 567.

⁶⁵ Choo *Hearsay and Confrontation in Criminal Trials* (Clarendon Press Oxford, 1996) at 7.

⁶⁶ In the aftermath of the establishment of the State, the *Documentary Evidence Act 1925* enacted a similar statutory regime for public documents. The Commission has considered these Acts in detail in its *Consultation Paper on Documentary and Electronic Evidence* (LRC CP 57-2009). More recently, the *Criminal Evidence Act 1992* (which implemented a recommendation to this effect in the Commission's 1987 *Report on Receiving Stolen Property* (LRC 23-1987)) enacted an inclusionary exception for business documents, confined (as the title of the 1992 Act indicates) to criminal proceedings: see the discussion in Chapter 5, below.

D Conclusion

1.31 It is apparent from this brief historical survey that it is not possible to set out a single overarching rationale for the exclusionary nature of the hearsay rule or, indeed, for the development of the inclusionary exceptions developed in the 19th century. Nonetheless, two reasons continue to be given in Ireland as important foundations for the rule: the absence of cross-examination and that the statements were not made under oath.⁶⁷ In Ireland the hearsay rule stands largely unchanged from its historical common law heritage, although as already noted a number of specific statutory changes have reformed the rule in an inclusionary direction. It is important that the approach which underlay these important changes should be analysed in detail before proceeding to make proposals for reform, if any. The Commission turns, therefore, in Chapters 2 and 3, to describe the current law in Ireland (including the constitutional rights-based dimension to the rule) with a view to providing a clear overview of its content. In Chapters 4 and 5, the Commission then sets out its proposals for reform in civil cases and criminal cases, respectively.

⁶⁷ See the judgment of Kingsmill Moore J in *Cullen v Clarke* [1963] IR 368, at 378, discussed at paragraph 2.04, below.

CHAPTER 2 OVERVIEW OF THE HEARSAY RULE IN CURRENT IRISH LAW

A Introduction

2.01 This Chapter examines the general scope of the hearsay rule as it currently operates in Ireland (in Chapter 3, the Commission examines the inclusionary exceptions to the rule). In Part B, the Commission discusses the definition of hearsay in Irish law, with particular emphasis on the fact that the testimony involved is aimed at proving the truth of the facts contained in the out-of-court statement. The Commission discusses the distinction between original evidence and hearsay, which also focuses on the purpose for which evidence is presented in court. In Part C, the Commission discusses the types of out-of-court statements that may constitute hearsay, including oral statements, documentary evidence, statements by conduct and implied assertions.

2.02 In Part D, the Commission examines the general principles of the law of evidence against which the hearsay rule is to be considered. These include the best evidence rule, which was of particular importance in the early development of the rule, whereas the principles of relevance and materiality have attracted greater judicial comment since the second half of the 20th century. The Commission also examines how the concept of fair procedures under the Constitution of Ireland and the European Convention on Human Rights (and the related right to confront in criminal cases under the Constitution) has affected recent analysis of the hearsay rule.

B Defining hearsay, and the distinction between original evidence and hearsay

2.03 In this Part, the Commission examines the definition of hearsay in Irish law. As already mentioned, the hearsay rule is an exception to the general principle in the law of evidence that all relevant evidence is admissible, and it applies to testimony given by a witness concerning statements spoken or made by a person who is not produced in court as a witness if the testimony is presented to prove the truth of the facts which they assert.¹ The exclusionary hearsay rule, in its pure form, refuses to be content with secondary evidence as

¹ See the Introduction, paragraph 2, above.

this eliminates the danger that evidence retold by a secondary source may have become garbled and so possible error in the trial may ensue.²

2.04 In *Cullen v Clarke*,³ the leading decision of the Supreme Court on the hearsay rule in Ireland, Kingsmill Moore J summarised the position as follows:⁴

“[I]t is necessary to emphasise that there is *no* general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There is a general rule, subject to many exceptions,⁵ that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert; the reasons being that the truth of the words cannot be tested by cross-examination and has not the sanctity of an oath. This is the rule known as the rule against hearsay.”

2.05 In the *Cullen* case, the applicant had obtained a partial disability benefit under the *Workmen's Compensation Act 1934* (since replaced by comparable provisions in the *Social Welfare Consolidation Act 2005*) and he then applied to have this treated as a full disability. In support of this claim, which at that time involved an application to the Circuit Court (these are now dealt with by assessment officers in the Department of Social and Family Affairs under the 2005 Act), he attempted to use statements made by potential employers as to why they had refused to employ him, but did not call them as witnesses. The Supreme Court (affirming the decision of the Circuit Court) held that these out-of-court statements were inadmissible under the hearsay rule because it was clear that the applicant was attempting to rely on the truth of what was contained in the statements to support his claim for a full disability benefit.

2.06 The judgment of Kingsmill Moore J in *Cullen* makes it clear that the hearsay rule is a general rule (subject to many exceptions) to the effect that testimony given by a witness concerning words spoken, statements made or documents generated by a person who is not produced in court as a witness is inadmissible if the testimony is presented to prove the truth of the facts which

² Williams *The Proof of Guilt: A Study of the English Criminal Trial* (3rd ed Stevens & Sons, London, 1963) at 195 -196.

³ [1963] IR 368.

⁴ *Ibid*, at 378 (emphasis in the original).

⁵ Kingsmill Moore J referred to a number of these exceptions in his judgment ([1963] IR 368, at 378-381), to which the Commission returns in Chapter 3, below.

they assert. The judgment equally makes clear that there is no general rule preventing a witness from testifying as to such words, statements or documents if the testimony is not being presented to prove the truth of the facts.

2.07 Indeed, McGrath⁶ underlines this distinction by noting that the judgment serves to emphasise “a cardinal and, at times misunderstood aspect of the rule against hearsay” – that is that the rule does not exclude all out-of-court statements, but rather only those that are offered to prove the truth of their contents. A witness will, therefore, not be prevented from giving evidence about an out-of-court statement if it is being introduced into proceedings merely to confirm that the statement was made or if its making is relevant to an issue in the proceedings. For example, as the Commission noted in its 1980 *Working Paper on the Rule Against Hearsay*,⁷ if the issue in a case is whether an assault by Ben upon Adam was provoked, the fact that, prior to the assault, Ben had verbally insulted Adam or had made an insulting gesture would be admissible in evidence as relevant to the issue of provocation. Similarly, in *Fullam v Independent Newspapers Ltd*⁸, a defamation claim, the plaintiff, a professional footballer, claimed that he had been defamed by an article which repeated certain terrace chants and jeers about him (that he could only shoot with one foot and, by implication, was not entitled to be paid as a professional footballer). He was allowed to introduce evidence describing the terrace chanting as this was solely for the purpose of identifying him as the subject of the newspaper article.

2.08 In spite of this, it is not always easy to draw a distinction between statements that fall within the ambit of the rule and those that fall outside it. This is especially so in the context of the distinction between original evidence and hearsay. It is a long-established rule in the law of evidence that original evidence of a statement is admissible not to prove that the statement is true but to prove that it was made.⁹ A statement may be admissible as original evidence because it is itself a fact in issue¹⁰ or the statement is relevant to a fact in issue in the proceedings. If the evidence is adduced for either purpose, the fact that a statement is made out of court does not render it hearsay. The leading American writer Wigmore emphasised the importance of identifying the purpose

⁶ McGrath *Evidence* (Thompson Roundhall 2005) paragraph 5-02.

⁷ Law Reform Commission *Working Paper on the Rule Against Hearsay* (LRC 9 - 1980) at 3.

⁸ [1955-56] Ir Jur Rep 45.

⁹ *Subramaniam v Public Prosecutor* [1956] 1 WLR 965.

¹⁰ *R v Chapman* [1969] 2 QB 436.

for which a statement is tendered in order to see whether it is a hearsay statement. He stated:

“The prohibition of the Hearsay rule, then, does not apply to all words or utterances... The Hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely as assertions to evidence the truth of the matter asserted.”¹¹

2.09 A clear application of this important distinction is the decision of the UK Judicial Committee of the Privy Council in *Subramaniam v Public Prosecutor*,¹² in which the defendant was charged with possession of ammunition for the purpose of helping a terrorist enemy, which carried a sentence of death. He pleaded the defence of duress,¹³ claiming that he had no choice as the terrorists, who had captured him, had threatened to kill him if he did not follow through with their requests. As part of the defence he wished to testify about conversations he had had with the terrorists. At his trial, these conversations were found to be hearsay and excluded. On appeal to the Privy Council, that decision was overturned and the evidence was admitted on the basis that the conversations would be hearsay only if the purpose of submitting the evidence was to prove the truth of the contents of the statements. The Privy Council held that evidence of what had been said to the defendant by the terrorists was relevant to whether he had been acting under duress, regardless of the truth or otherwise of what was said.¹⁴

“In the case before their Lordships statements could have been made to the appellant by the terrorists which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes.

2.10 Similarly, in the Canadian case *R v Baltzer*¹⁵ the defendant had been charged with murder. To support a defence of insanity the defendant sought to call two women to testify that he had said “weird” things. The Supreme Court of Nova Scotia held that the evidence was admissible to show

¹¹ *Wigmore on Evidence* (3rd ed Little Brown, 1940) Vol 6, at 178.

¹² [1956] 1 WLR 965.

¹³ As to the scope of this defence in Irish law, see the Commission's *Report on Defences in Criminal Law* (LRC 95 – 2009), Chapter 5.

¹⁴ [1956] 1 WLR 965, at 970.

¹⁵ (1974) CCC (2d) 118.

the accused's state of mind and did not constitute hearsay. MacDonald JA stated:¹⁶

"If, therefore, the relevance of the statement lies in the fact that it was made, it is the making of the statement that is the evidence -- the truth or falsity of the statement is of no consequence if the relevance of the statement lies in the fact that it contains an assertion which is, itself, a relevant fact, then it is the truth or falsity of the statement that is in issue. The former is not hearsay, the latter is."

2.11 At common law, therefore, the distinction between original evidence and hearsay may be relatively clear as the *Subramaniam* and *Baltzer* cases indicate. Indeed, as pointed out by Kingsmill Moore J in *Cullen v Clarke*,¹⁷ "[t]he actual question put and the object for which it was put in each case has to be considered," which also reflects Wigmore's analysis referred to above. Nonetheless, the development of inclusionary exceptions to the exclusionary hearsay rule (both by common law and by legislation) has resulted in situations where the line between hearsay and non-hearsay evidence has become difficult to distinguish with precision.

2.12 Despite the difficulty at times in drawing the distinction between original evidence and hearsay evidence, it is important that the Commission sets out a clear definition that would form part of the statutory framework which the Commission ultimately recommends on foot of its proposals for reform. In this respect, it is clear that the judgment of Kingsmill Moore J in *Cullen v Clarke*¹⁸ provides a clearly-stated reference point for such a definition. Accordingly, the Commission provisionally recommends that hearsay should be defined in legislation as any statement, whether a verbal statement, written document or conduct,¹⁹ which is made, generated or which occurred out of court involving a person who is not produced in court as a witness, and where the statement is presented as testimony to prove the truth of the facts which they assert.

2.13 *The Commission provisionally recommends that hearsay should be defined in legislation as any statement, whether a verbal statement, written document or conduct, which is made, generated or which occurred out of court*

¹⁶ *Ibid* at 143.

¹⁷ [1963] IR 368, at 378.

¹⁸ *Ibid.*

¹⁹ While the Commission discusses the general scope of the hearsay rule in Part C, below, it has included the reference to "a verbal statement, written document or conduct" in this definition for the sake of completeness.

involving a person who is not produced in court as a witness, and where the statement is presented as testimony to prove the truth of the facts which they assert.

C Scope of the Hearsay Rule

2.14 Statements covered by the hearsay rule may take many forms, and the Commission turns in this Part to explore this aspect of the scope of the hearsay rule. In terms of its development at common law, the rule applies to oral statements, written (documentary) statements and statements by conduct.

(1) Oral Hearsay

2.15 Spoken words as well as written statements may constitute hearsay depending on the purpose for which they are adduced in evidence. In the English case *R v Gibson*,²⁰ the accused had been charged with malicious wounding, the allegation being that he had thrown a stone at the victim. The victim testified at the trial that he had not seen the accused throw the stone but also testified that, immediately after he had been hit by the stone, an unidentified woman had pointed to the door of the accused's home and said: "The person that you are looking for went in there". The accused was convicted but, on appeal, the conviction was quashed on the basis that the victim's testimony concerning the unidentified woman was inadmissible under the hearsay rule. In the UK Privy Council decision *Teper v R*,²¹ the accused was charged with arson of his own shop. A prosecution witness gave evidence that he heard an unidentifiable woman shouting at the driver of a car who resembled the accused: "Your place is burning and you going away from the fire." The Privy Council held that this testimony was inadmissible hearsay.

2.16 The Supreme Court has taken a similar approach to the hearsay rule in Ireland. As already discussed above, in *Cullen v Clarke*²² the Supreme Court held that out-of-court oral statements made by persons who had not been called as witnesses were inadmissible hearsay where these statements were being presented to prove the truth of their contents.

(2) Written and Documentary Hearsay

2.17 It is well-established that the hearsay rule applies not merely to oral statements but also to written and documentary statements. This clearly covers an exceptionally wide range of important documents, including letters, medical records, business records and public records such as birth and death

²⁰ (1887) 18 QBD 537.

²¹ [1952] AC 378.

²² [1963] IR 368. See the discussion at paragraph 2.04ff, above.

certificates. Thus, in *Hughes v Staunton*,²³ a medical negligence claim, it was accepted that a large number of medical records connected with the issues in dispute would have been deemed inadmissible because the persons who had originally created the documents were not available to be cross-examined in court. In the High Court, the parties had agreed that the records should be admitted, and Lynch J agreed to this, noting however that it would be preferable if the inclusionary-oriented reforms proposed for the hearsay rule in civil claims in the Commission's 1988 *Report on the Rule Against Hearsay in Civil Cases*²⁴ were implemented in legislative form.

2.18 In the absence of agreement, documentary records are, in general, inadmissible if introduced to prove their contents. Thus, in *The People (Attorney General) v O'Brien*²⁵ the defendant had been charged with, and convicted of, manslaughter. He claimed to suffer from epilepsy and his defence of self-defence was, he asserted, supported by certain hospital records that referred to him as "epileptic." The records did, indeed, state this, but the medical staff who had created these records were not available in court to be examined on them. The trial judge ruled the records inadmissible hearsay and, on appeal, the Court of Criminal Appeal upheld this decision. The Court rejected the argument that a different approach to the hearsay rule should apply to the defence by contrast with where the prosecution wished to introduce hearsay. The Court stated:²⁶

"In a criminal trial, the administration of justice according to law means justice for the People and for the accused, and the admission in evidence of matters which either side wishes to produce must be decided by the same principles of law."

2.19 This particular issue of the admissibility of documentary business records has since been dealt with by Part II of the *Criminal Evidence Act 1992*, which provides that documentary records compiled in the course of business are now admissible.²⁷ Indeed, the issue of the admissibility of such documentary records in criminal cases – and arguably, the discussion of reform of the hearsay rule in general in many countries – could be traced to the reaction to the outcome of the 3-2 majority decision of the 1965 UK House of Lords

²³ High Court, 16 February 1990: see the discussion at paragraph 4.05, below.

²⁴ LRC 25-1988. See the discussion in Chapter 4, below.

²⁵ (1969) 1 Frewen 343.

²⁶ *Ibid*, at 345.

²⁷ The 1992 Act implemented the Commission's recommendation to this effect in its 1987 *Report on Receiving Stolen Property* (LRC 23-1987): see the discussion at paragraphs 5.08 - 5.12, below.

decision in *Myers v DPP*²⁸ that such documents were inadmissible hearsay, and that the Court was not willing to create a new inclusionary exception to the hearsay rule for such documents. As discussed below, the UK Parliament almost immediately provided in the *Criminal Evidence Act 1965* that documentary records prepared in the course of business were to be admissible. From one perspective, the decision of the majority in *Myers* has been widely criticised for holding inadmissible what appeared to be quite reliable documentary evidence, and many commentators praised the two judges in the minority for advocating a new inclusionary exception to the hearsay rule. From another perspective, since the 3-judge majority in the *Myers* case acknowledged that the hearsay rule was badly in need of reform, the decision could be regarded as the pearl-like instigator of the legislative reforms that have followed in many countries in the intervening years.

2.20 Because of the subsequent impact of the *Myers* case, it is important to discuss it here in some detail. In *Myers* the defendants had been charged with a number of offences, including conspiracy to receive stolen cars, conspiracy to defraud the purchasers of the stolen cars and resolving (breaking up) five cars knowing them to have been stolen. The prosecution sought to establish that, in the case of each of 22 cars, an identical wrecked car had been purchased by the defendants, and that the stolen cars had been sold by them after each one had been given the registration number and other identification numbers of the wrecked car. The owner of each stolen car was asked to identify it. The defendants admitted purchasing 12 of the wrecked cars and selling 12 cars bearing the same registration numbers as the 12 wrecked cars, but contended that the wrecked cars had been repaired and rebuilt, and that they were not the stolen cars. They also argued that, in rebuilding the wrecked cars, they had innocently removed the identification marks and plates and had replaced them on the rebuilt cars, so that the numbers registered in respect of those cars corresponded.

2.21 In order to establish that the cars admittedly sold by the defendants were the stolen cars in disguise, the prosecution called employees of the manufacturers of the cars. These witnesses produced records compiled by various employees as the cars were made which showed the engine, chassis, and cylinder block numbers which had been recorded on a card by the employees as the car was originally made. Of those numbers, the cylinder block number alone was moulded into a secret part of the block and could not be obliterated or removed. The witnesses called were persons who maintained these records but had not actually compiled them. The defence objected to this evidence on the ground that it was hearsay, and that the manufacturer's records could not be tendered as proof of the truth of the facts stated in them.

²⁸ [1965] AC 1001.

2.22 The trial judge admitted the evidence and the defendants were convicted. On appeal, by a 3-2 majority the UK House of Lords (since 2009, replaced by the UK Supreme Court) held that the evidence was inadmissible and overturned the convictions. The Court unanimously held that, as a general rule, hearsay evidence was not admissible, and that to justify its admission would require that the example came within some exception to the rule. The majority of the Court decided that no new exceptions to the rule should be created by the courts as this would amount to judicial legislation. The majority held that the records in this case could not be brought within the exception relating to public documents open to inspection by the public or any other established exception. Nor were they admissible as evidence to corroborate other evidence unless they could stand on their own feet. The majority also rejected the suggestion that a trial judge has a discretion to admit a record in a particular case if satisfied that it was trustworthy and that justice required its admission, because that would also involve an innovation in the then-existing law, which decided admissibility by categories and not by apparent trustworthiness. Accordingly, the Court concluded, this evidence ought not to have been admitted at the defendants' trial.

2.23 Lord Reid, one of the majority judges in *Myers*, stated:

“[T]here are limits to what we [as a Court] can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations; that must be left to legislation. And if we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty. If we disregard technicalities in this case and seek to apply principle and common sense, there are a number of other parts of the existing law of hearsay susceptible of similar treatment, and we shall probably have a series of appeals in cases where the existing technical limitations produce an unjust result. If we are to give a wide interpretation to our judicial functions questions of policy cannot be wholly excluded, and it seems to me to be against public policy to produce uncertainty. The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate.”²⁹

2.24 The majority view was that the categories of admissible documentary hearsay were limited to those already established at that time, at least as far as the judicial development of the hearsay rule was concerned. Lord

²⁹ [1965] AC 1001, at 1021-1022.

Reid clearly considered that the policy matters that required analysis in terms of any new inclusionary exceptions were a matter for the UK Parliament and, as the passage quoted indicated, he considered that a complete review of the hearsay rule was “long overdue.” The *Myers* decision was given just before the establishment of the Law Commission for England and Wales, and the subsequent legislative amendments to the hearsay rule in the UK (such as those in the UK *Criminal Justice Act 2003* and the equivalent provisions in Part III of the *Criminal Justice (Evidence)(Northern Ireland) Order 2004*) have largely arisen from the implementation of Law Commission recommendations.³⁰

2.25 The two judges in the minority in the UK House of Lords in *Myers*, Lord Pearce and Lord Donovan, considered that the evidence in question was fair, clear, reliable and sensible and that the trial judge had correctly admitted it. Lord Pearce agreed with the majority that the general exclusion of hearsay evidence, subject to exceptions permitted where common sense and the pursuit of truth demanded it, was an important and valuable principle; but that it was a disservice to that general principle if the courts limited the necessary exceptions so rigidly that the general rule created a frequent and unnecessary injustice. Lord Pearce discussed the superiority of the documentary hearsay in the *Myers* case to that of the hypothetical oral testimony of an untraceable employee witness:³¹

“In the present case, if the anonymous workman who copied down the number could be proved to be dead, the records would be admissible as declarations in the course of duty. Since we do not know whether he is dead or not, the court, it is argued, cannot inform itself from the records; but in this case the fact that he is not on oath and is not subject to cross-examination has no practical importance whatever. It would be no advantage, if he could have been identified, to put him on oath and cross-examine him about one out of many hundreds of repetitious and routine entries made three years before. He could say that to the best of his belief the number was correct; but everybody already knows that. If he pretends to any memory in the matter, he is untruthful; but, even if he is, that in no way reflects on whether he copied down a number correctly in the day's work three years before. Nor is it of any importance how he answers the routine question in cross-examination: ‘You may have made a mistake?’ Everybody knows that he may have made a mistake. The jury knew it

³⁰ See, for example, the discussion in the UK Supreme Court decision *R v Horncastle* [2009] UKSC 14, at paragraph 2.112ff, above.

³¹ [1965] AC 1001, 1036-1037.

without being told, the judge told them so at least once and both counsel told them so, probably more than once.

The only questions that could helpfully be asked on the matter were whether the particular system of recording was good and whether in practice it had been found prone to error. These questions could not be answered by the individual workman but they could be dealt with by [the witness who maintained the manufacturer's records] if the defence wished to probe into the matter. He and not the workmen would know how efficient the system had been found in practice and how often, if at all, it had been shown subsequently that mis-recordings must have occurred. The evidence produced is therefore as good as evidence on this point can be; it is the best evidence, though it is of course subject, like every other man-made record, to the admitted universal human frailty of occasional clerical error. The fact that the engine and chassis numbers which emanated from precisely the same source are admissible because they have been embodied in a public document, namely the log-book, shows up the absurdity of excluding these records".

2.26 The approach taken by the two judges in the minority in *Myers* has generally been more favourably received than the majority, largely because the outcome in the particular case meant that ordinary persons thought the result was not appropriate. As already discussed above, while some courts - for example, the Supreme Court of Canada - have taken the view that the hearsay rule can still be developed by judicial decision, the courts in Ireland have resisted this approach, so that reform appears to be exclusively a matter for the Oireachtas.

2.27 As mentioned, the actual outcome in the decision in *Myers* was widely criticised, and the UK Parliament virtually immediately reversed the approach taken by the majority (in effect, talking up Lord Reid's invitation of reform by legislative means) by enacting the *Criminal Evidence Act 1965*, which made admissible first hand documentary statements and records created in the course of business, precisely the type of documents held inadmissible in *Myers*. The provisions of the 1965 Act have since been consolidated into the UK *Criminal Justice Act 2003*. In Ireland, Part II of the *Criminal Evidence Act 1992* has followed the same approach by providing that documentary records compiled in the course of business are admissible.³²

³² The 1992 Act implemented the Commission's recommendation to this effect in its 1987 *Report on Receiving Stolen Property* (LRC 23-1987): see the discussion at paragraphs 5.04 - 5.12, below.

(3) Statements by conduct

2.28 The exclusionary hearsay rule is also applicable to signs, gestures, drawings, charts and photographs. Each of these “statements” is identifiable as being hearsay in nature. However, there is much less certainty as to whether the hearsay rule applies or should apply to statements or non-verbal conduct which are not intended by their maker to assert that they are tendered to prove. Lederman and Bryant suggest that the more prevalent view is that an individual’s conduct which is intended to be assertive “falls within the mischief of the hearsay rule and is therefore inadmissible”.³³

2.29 It is generally accepted that conduct falls within the scope of hearsay where it is intended to be “communicative”.³⁴ In many common law countries, the hearsay rule is restricted to conduct that is intended by the declarant to be an assertion.³⁵ The courts in England broadened the hearsay rule in the 19th century to include conduct which is tendered to prove a fact or belief that may be implied from the act as coming within the exclusionary hearsay rule. This approach was applied in *Wright v. Doe d. Tatham*³⁶ where the act of letter writing offered to show the sanity of the writer’s state of mind was held to be hearsay.

(4) Intention to Assert

2.30 In England, the Law Commission had initially taken the view³⁷ that if it is known that a person spoke or acted in such a way as to cause someone else to infer the truth of a particular proposition, two inferences may be drawn: first that that person at that time believed that proposition to be true, and second that that belief was correct. Neither inference is inevitable: the person may have been seeking to mislead, or may have been mistaken. The English Commission commented that the hearsay rule recognises that if both these risks are present then, in the absence of an opportunity to cross examine the person in question, there is good reason to exclude evidence of his words or conduct. If the risk of deliberate fabrication can be discounted, the possibility of a mistake is not

³³ Sopinka, Lederman and Bryant *The Law of Evidence in Canada* (2nd ed Butterworths 1999) paragraph 6.15.

³⁴ McGrath *Evidence* (Thompson Roundhall 2005) paragraph 5-37.

³⁵ See rule 801(a) of the US *Federal Rules of Evidence* which provides that a ‘statement’ includes “nonverbal conduct of a person, if it is intended by the person as an assertion”.

³⁶ (1838) 7 Eng. Rep. 559.

³⁷ *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997: No. 245) at 7.18.

necessarily sufficient reason to exclude evidence of the words or conduct. Where there is a substantial risk that an out-of-court assertion may have been deliberately fabricated the assertion should fall within the hearsay rule, whether it is express or implied. Where that risk is not present – in other words, where the person from whose conduct a fact is to be inferred can safely be assumed to have believed that fact to be true – the Law Commission stated that it did not think a court should be precluded from inferring that fact merely because that person may have been mistaken in believing it. It took the view that a person's words or conduct should not be regarded as asserting a fact, and therefore should not be caught by the hearsay rule if adduced as evidence of that fact, unless that person intends to assert that fact.³⁸

2.31 Ultimately, the English Law Commission modified this approach in coming to its final view on this issue. It noted that the idea of an “intention to assert” was ambiguous and the danger remains that the person making the statement intended to mislead or was aware that the statement may be construed in a misleading manner, although that is not the intent of the statement maker. The Law Commission illustrated the difficulty associated with the idea of “intention to assert” by reference to the UK Privy Council decision in *Teper v R*.³⁹ As already mentioned, in that case the defendant had been charged with arson of his own shop. A woman had been heard to shout to a passing motorist “Your place burning and you going away from the fire”. The English Law Commission stated that if the woman's intention had been to draw the attention of bystanders to the fact that the defendant was leaving the scene, her words would be hearsay, since she might have been trying to mislead the bystanders. If, however, she was intending only to indicate to the motorist that she knew the defendant, she could not be seeking to mislead anyone about who he was. “If he was Teper, he knew he was; and if he was not, she could not hope to convince him that he was. She might still be asserting that he was Teper, but she would not be intending to persuade anyone of this.”⁴⁰

2.32 Having regard to the difficulties and dangers associated with allowing the test for admission to rest on an “intention to assert” the Law Commission went on to consider whether the appropriate basis for admitting a statement is “whether he or she intended to act in a manner to cause another person to believe that fact”. The difficulty with this approach is that it would close off statements that ought to be captured by the hearsay rule if, for example, that statement had been fabricated and the person it was relayed to

³⁸ *Ibid* at 7.19-7.21.

³⁹ [1952] AC 480.

⁴⁰ *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997: No. 245) at 7.28.

had no cause to believe it was fabricated.⁴¹ The English Commission gave the following example. If it is sought to prove that A working for company X travelled to a particular destination on a specified date by adducing her claim form as evidence, that claim form whether processed by another person in company X or processed by an automated machine, should be captured by the hearsay rule as there is a risk the information may be false and the standard of “intending to act in a manner to cause another person to believe that fact” is not scrupulous enough. The Law Commission in its revised analysis of the concept of intent believed that it was a more defensible position to invoke a ‘purpose’ element into the consideration of whether a statement ought to be admitted in criminal proceedings or excluded as hearsay.

(5) Implied Assertions

2.33 An implied assertion is a statement by conduct that is not tendered to prove the truth of its contents but is taken to allow an inference to be drawn from it. Where a statement by conduct is intended to assert the truth of a fact, it is clear that this is, in general, inadmissible under the hearsay rule. However, a more difficult issue is whether, and to what extent, the hearsay rule applies to statements by conduct where they are not tendered to prove the truth of the contents but are tendered for the purpose of allowing the judge or jury to draw an inference from the contents of the statement. The courts in Ireland have never considered in detail whether such conduct statements may be admitted in evidence or whether they are inadmissible hearsay. The comments of Kingsmill Moore J in the leading Supreme Court decision *Cullen v Clarke*⁴² suggest they are not hearsay and would be admissible as the rule is confined to assertions of fact.⁴³

2.34 In the UK, the *Civil Evidence Act 1968* considerably relaxed the strict rule of exclusion, and the abolition of the hearsay rule in civil cases was completed by the *Civil Evidence Act 1995*.⁴⁴

2.35 Until the enactment of the UK *Criminal Justice Act 2003* the issue of implied assertions in criminal proceedings had not been fully resolved. The leading case until then in England was *Wright v Doe d. Tatham*.⁴⁵ In *Wright* a potential heir applied to set aside a will on the ground that the testator was

⁴¹ See *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997: No. 245) at 7.34.

⁴² [1963] IR 368.

⁴³ [1963] IR 368 at 378.

⁴⁴ This is discussed in greater detail in Chapter 4, below.

⁴⁵ (1838) 7 Eng. Rep. 559.

mentally incompetent at the time he made the will. At the trial the will's beneficiary attempted to prove the testator's competency by offering several letters written to the testator. The correspondence was adduced in evidence as being relevant to the issue of whether the deceased had been competent to make a valid will. All of the letters were on subjects, and expressed in language, relevant to a person of reasonable intelligence. The authors of the letters had died prior to the trial. They were tendered as evidence that the deceased was of sound mind because it was inconceivable that the writers, who were men of intelligence, would have written to the deceased in such a manner if they believed him to be mentally incompetent. The UK House of Lords held that the correspondence ought to be excluded because the writing of the letters constituted implied assertions of a hearsay nature by the letter writers concerning the deceased's testamentary capacity.

2.36 The decision in *Wright v Doe d. Tatham* was approved by the UK House of Lords in *R v Kearley*.⁴⁶ In *Kearley* the defendant was convicted of drug trafficking. One of the central pieces of prosecution evidence was that large numbers of people had telephoned the defendant's house asking for drugs. On appeal, the defence argued that this evidence was inadmissible hearsay as the police were reporting statements made by persons unknown, who could not themselves be called as witnesses.

2.37 The English Court of Appeal rejected this argument, on the grounds that the police reports were evidence of the callers' beliefs about the defendant, not of the truth of the allegation that the defendant was a drug dealer. On further appeal, the UK House of Lords, by a 3-2 majority, quashed the defendant's conviction because the prospective customers' requests allegedly contained an implied assertion that he was a drug-dealer. The majority view was that, if evidence of the callers' states of mind was not excluded as hearsay, it was still inadmissible, because it was logically irrelevant. There are, it was suggested, many innocent ways to explain the state of mind of the callers. The majority view was that, if the reports of the phone calls had been tendered as evidence of the defendant's being a drug dealer, rather than as evidence of the callers' states of mind, it would have been inadmissible hearsay. The majority argued that one should not be allowed to get around the hearsay rule simply because words implied, rather than expressly stated, a particular fact. By contrast, the two judges in the minority considered that the telephone evidence should not have been excluded by the hearsay rule, as it flew in the face of common sense and that it was difficult to think of more convincing evidence that went to show that a pattern of behaviour was associated with the defendant. On this view it was not the callers' statements that were evidence of the matters stated, but their behaviour was evidence of their state of mind.

⁴⁶ [1992] 2 AC 228.

2.38 Duff agrees that the majority in *Kearley* was of the view that this would be extremely dangerous and would make a nonsense of the hearsay rule:

“It would allow the prosecution, or the defence for that matter, to smuggle in all sorts of second hand evidence as long as the assertion was not express but comprised a hint or a ‘nod and a wink’.”⁴⁷

2.39 The minority view of the House of Lords in *Kearley* was that, although the callers’ behaviour was technically hearsay if put as evidence of the fact that the defendant was a drug dealer, it was admissible hearsay, because it contained only an implied assertion. Lord Griffiths took the view that the police evidence was not hearsay, because the callers were not actually asserting that the appellant was a drug dealer. He considered that the police evidence was direct evidence of the fact that lots of people had tried to contact him to buy drugs, from which “the obvious inference” could be drawn that the defendant was a drug dealer.⁴⁸ Lord Browne-Wilkinson stated that the police testimony was “circumstantial evidence” from which the jury could draw the inference that the defendant sold drugs.⁴⁹ The minority view in *Kearley* was cited with approval in a Scottish case, *Lord Advocate’s Reference (No 1 of 1992)*⁵⁰ heard shortly after the *Kearley* decision and, in Scotland, implied assertion are not regarded as hearsay.

2.40 Roberts and Zuckerman claim that the decision in *Kearley* is “deeply flawed and quickly collapses into a *reductio ad absurdum*”, whereby virtually all evidence could be argued to be hearsay thus rendering nonsensical the exclusionary hearsay rule.⁵¹ They assert that the mistake made by the UK House of Lords was to confuse a “genuine” implied assertion with the “unspoken assumption” of the prospective purchasers that the defendant was going to sell them drugs, on the basis of which the majority of the court were imputing an assertion to these callers.⁵² As an example of a genuine implied assertion, Roberts and Zuckerman cite the UK Privy Council decision in *Teper v*

⁴⁷ Duff “The Demise of *Kearley* – A Hearsay Problem Solved?” (2005) *International Commentary on Evidence* (2) 1.

⁴⁸ *R v. Kearley* [1992] 2 AC 228, 238.

⁴⁹ *Ibid* at 279.

⁵⁰ [1992] SCCR 724, 741.

⁵¹ Roberts and Zuckerman *Criminal Evidence* (Oxford, OUP, 2004) at 590.

⁵² *Ibid* at 591.

R,⁵³ where, as already discussed, at the accused's trial for arson, police evidence was led that an unidentified witness at the scene had said "Your place burning and you going away from the fire". In their view, this evidence was quite correctly ruled inadmissible as a 'true' implied assertion because the speaker's intention clearly was to assert, albeit indirectly, that the accused's behaviour was somewhat suspicious. This was different from the situation in *Kearley* where the intention of the callers was simply to buy drugs and not to make any statements or accusation about the defendant's person. Therefore the question of an implied assertion did not arise and the evidence should have been admitted.⁵⁴

2.41 The minority in *R v Kearley* argued that implied assertions of the kind in that case were more reliable than oral reports. The Law Commission in England agreed with them⁵⁵ and this is now reflected in the English *Criminal Justice Act 2003*.⁵⁶ This was confirmed in *R v Singh*⁵⁷ where the English Court of Appeal held that sections 114 and 118 of the *Criminal Justice Act 2003* had abolished the common law rule against implied assertions. In *Singh* the defendant had been charged with conspiracy to kidnap, and an important part of the evidence against him consisted of records from the memory of mobile phones showing that he had been regularly in contact with the other people allegedly involved in the conspiracy. The English Court of Appeal held that, under section 115(3) of the 2003 Act,⁵⁸ such evidence did not amount to hearsay, and it was admissible on the simple basis that it was relevant. Section 115(3) of the 2003 Act thus significantly limited the effect of the majority decision in *R v Kearley*. The hearsay rule, as set out in the UK 2003 Act, now only catches intentional assertions and the rule would not make inadmissible evidence of the kind presented in *Kearley*.

⁵³ [1952] AC 480.

⁵⁴ Roberts and Zuckerman *Criminal Evidence* (Oxford, OUP, 2004) at 592.

⁵⁵ Law Commission *Report on Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997) LC 245.

⁵⁶ The changes to the law relating to hearsay evidence arising from the *Criminal Justice Act 2003* are discussed in greater detail in Chapter 5, below.

⁵⁷ [2006] EWCA 660.

⁵⁸ Section 115(3) of the 2003 Act provides: "A matter stated is one to which this Chapter applies if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been — (a) to cause another person to believe the matter, or (b) to cause another person to act or a machine to operate on the basis that the matter is as stated."

2.42 Duff states⁵⁹ that while the provisions in the UK *Criminal Justice Act 2003* reduce the potential scale of the difficulties created by *Kearley* they do not solve the problem entirely, and the difficulty of drawing a boundary between admissible and inadmissible evidence remains. In an article written before the 2003 Act, Guest argued that to make best sense of the rule a line should be drawn so that the hearsay rule excludes only statements in which there is a “propositional content” made in the out-of-court statement and intended to be used to prove their truth.⁶⁰ Guest maintained that this conclusion would, firstly, find whether an out-of-court statement was made and second, find whether that statement was being offered as proof of its truth. In adopting this approach, he argued that the problem cases such as *Wright v. Doe d. Tatham*,⁶¹ where no statements are made, would be avoided.⁶²

2.43 In *Walton v R*⁶³ and *Pollitt v R*⁶⁴ the High Court of Australia twice attempted to resolve the question of how implied assertions should be characterised but were unable to reach a consensus on this. In the *Walton* case, Mason CJ was in favour of applying the hearsay rule flexibly especially in regard to implied assertions made in the course of a social telephone conversation. Wilson, Toohey and Dawson JJ took the view that, as most conduct would contain an implied assertion of some sort and it would seriously deplete the stock of evidence if such evidence should be excluded, evidence of conduct is admissible provided the conduct is a relevant fact, notwithstanding it contains an implied assertion of some sort. In the *Pollitt* case, four out of seven members of the High Court of Australia held that evidence of an implied assertion is admissible to prove the identity of the maker of a phone call.

2.44 Since the enactment of the Australian *Evidence Act 1995*, unintended “implied assertions” are no longer excluded by the hearsay rule. Section 59(1) of the 1995 Act provides that evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by representation.

⁵⁹ Duff “The Demise of *Kearley* – A Hearsay Problem Solved?” (2005) *International Commentary on Evidence* (2) 1.

⁶⁰ Guest “Hearsay Revisited” (1988) *Current Legal Problems* 33.

⁶¹ (1838) 7 Eng. Rep. 559.

⁶² Guest “Hearsay Revisited” (1988) *Current Legal Problems* 33.

⁶³ (1989) 166 CLR 283.

⁶⁴ (1992) 174 CLR 558.

2.45 The US *Federal Rules of Evidence* classify a hearsay statement as an “assertive statement.”⁶⁵ In *United States v Zenni*⁶⁶ evidence of telephone calls by government agents (while conducting a legal search for evidence of bookmaking activities on the premises of the defendant) where the caller stated directions for the placing of bets on various sporting events was sought to be adduced as evidence by the prosecution and was objected to by the defence on the grounds that it was hearsay. A US federal District Court noted that the common law treatment of implied assertions was that they are subject to the hearsay rule. It noted that this was criticised and that, when the *Federal Rules of Evidence* were drafted, implied assertions was removed from its scope for two main reasons. Firstly, when a person acts in a way consistent with a belief but without intending by his act to communicate that belief, one of the principal reasons for the hearsay rule to exclude declarations whose veracity cannot be tested by cross-examination does not apply. Second, because the declarant's sincerity is not then involved the underlying belief is in some cases self-verifying. The Court noted that the *Federal Rules of Evidence* do not define what is meant by assertion but that it has the connotation of a forceful or positive declaration. The Court also noted that the Advisory Committee on the *Federal Rules of Evidence* had stated that: “The effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.” The Court pointed out that the *Federal Rules of Evidence* expressly exclude implied assertions from the ambit of the hearsay rule. It therefore concluded that “the calls were admitted as non-assertive verbal conduct, offered as relevant for an implied assertion to be inferred from them, namely that bets could be placed at the premises being telephoned. The language is not an assertion on its face, and it is obvious these persons did not intend to make an assertion about the fact sought to be proved or anything else.”

2.46 In light of this discussion, it is evident to the Commission that the issue of implied assertions has proved problematic, and that different solutions have been put in place in a number of different countries to address this. The Commission has come to the view that this is a matter worthy of further deliberation in the context of the preparation of its final recommendations on the scope of the hearsay rule. The Commission accordingly invites submissions as to whether implied assertions ought to be included in, or excluded from, the scope of the hearsay rule.

⁶⁵ Rule 801 of the *Federal Rules of Evidence*.

⁶⁶ 492 F.Supp. 464 (E.D.Ky. 1980)

2.47 *The Commission invites submissions as to whether implied assertions ought to be included in, or excluded from, the scope of the hearsay rule.*

D General Principles of Evidence and the Hearsay Rule

2.48 In this Part, the Commission examines the general principles of the law of evidence against which the hearsay rule is to be considered. At a fundamental level, the rules of evidence have the function of identifying and defining the evidence a court may receive in order to arrive at the truth of the matter or issue in dispute, whether in a civil or criminal case. The rules of evidence that have affected the development of the hearsay rule include the best evidence rule, which was of particular importance in the early development of the rule, whereas the principles of relevance and materiality have attracted greater judicial comment since the second half of the 20th century. The Commission also examines in this Part how the concept of fair procedures under the Constitution of Ireland and the European Convention on Human Rights has affected recent analysis of the hearsay rule.

2.49 The purpose of civil and criminal court proceedings is the resolution of disputes. Civil proceedings, by contrast with criminal proceedings, do not generally involve the potential removal of a person's liberty. A second fundamental difference is that, in civil proceedings in Ireland, court hearings involving a jury are now a rarity, confined, for example, to High Court defamation claims.⁶⁷ Thus, in virtually all civil cases the judge determines what evidence is admissible, hears that evidence, as a result then decides what the "facts of the case" are (the judge is the "trier of fact") and then applies the relevant law to determine the outcome. The same applies in summary criminal proceedings in the District Court, where the trial involves a hearing and determination by a judge alone: this form of criminal trial comprises the overwhelming majority of contested criminal trials (about 60,000 annually) conducted every year in the State. By contrast, in non-minor criminal cases tried on indictment (and which involve major criminal charges such as murder, rape and robbery, running to about 6,000 annually), Article 38.5 of the Constitution of Ireland generally⁶⁸ requires that the trial involves a judge and jury. In such

⁶⁷ The *Defamation Act 2009* retains juries for High Court defamation claims. Since the enactment of the *Courts Act 1988*, High Court personal injuries actions are heard by a judge alone, without a jury. All civil actions in the Circuit Court (including defamation actions) and in the District Court are heard by a judge alone.

⁶⁸ Article 38.2 allows for summary trials (in the District Court) for minor criminal offences cases, and Article 38.3 allows, on specified conditions, for non-jury trials

cases, the trial judge determines what evidence is admissible, directs the jury on the relevant law (for example, what constitutes murder, how to assess certain admissible evidence, what defences are available) and then the jury assesses the weight to be attached to the evidence and determines whether the defendant is guilty or not guilty (the jury is the “trier of fact”).

2.50 As already indicated, while no single principle can be said to be the only foundation for the development of the exclusionary hearsay rule, a number of general principles have been influential. In this Part, the Commission examines the influence of the best evidence rule and the concept of legal relevance. It is clear, however, that as the Supreme Court identified in *Cullen v Clarke*,⁶⁹ the absence of the ability to test hearsay evidence by cross-examination in court continues to be regarded as a clear basis for the hearsay rule. This has also been a factor in the more recent analysis of the rule in the context of the concept of fair procedures under the Constitution of Ireland and the European Convention on Human Rights, which completes the Commission’s discussion in this Part.

(1) The Best Evidence Rule

2.51 A central concern of the law of evidence has been to ensure that unreliable categories of evidence are not used to resolve disputes and that the evidence adduced must be the best evidence available. As already indicated in Chapter 1, while early Anglo-Norman courts allowed decisions to be based on the personal knowledge of people gained from their general experience and local knowledge, by the 18th century the “best evidence” rule often translated simply as requiring that evidence be presented orally in court by persons having direct knowledge of the facts in issue.

2.52 In general, of course, the insistence on the production of the “best evidence” is a way of preventing the danger of weaker proofs being substituted for stronger ones. The best evidence rule was one of the original foundations for the exclusionary hearsay rule, although the two rules are now quite distinct. As the UK House of Lords decided in *R v Blastland*⁷⁰ hearsay evidence is now, in

in Special Criminal Courts for major criminal offences: see generally, *Byrne and McCutcheon on the Irish Legal System* (5th ed Bloomsbury Professional 2009), para 5.103.

⁶⁹ [1963] IR 368: see paragraph 2.04, above.

⁷⁰ [1986] AC 41. Lord Bridge stated ([1986] AC 41, at 54): “The rationale for excluding [hearsay] as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a

general, excluded because its accuracy cannot be tested in cross-examination and therefore there is a danger that the fact finder, particularly a jury, might give such evidence undue weight. The law takes the view that truth is best ascertained by the unrehearsed answers, on oath or affirmation, of witnesses who have actually perceived the relevant events and who are in the presence of the court. Thus it is desirable to have a person present in court where his evidence can be tested by cross-examination and where his demeanour can be observed by the trier of fact. A second reason underlying the best evidence rule is to avoid the danger of the risk of error in evidence, that evidence which is relayed by a secondary source will become garbled.⁷¹

2.53 Not all secondary evidence, however, is necessarily unreliable and there are a number of qualifications and exceptions to the best evidence rule where secondary evidence will suffice, for example where the original is lost or has been destroyed. Thus, a series of Acts were passed, beginning in the 19th century, such as the *Evidence Act 1851*, the *Bankers' Books Evidence Act 1879* and the *Documentary Evidence Act 1925*, which provide that public records and certain financial records should be covered by an inclusionary approach. The Commission has considered these Acts in detail in its *Consultation Paper on Documentary and Electronic Evidence*⁷² and returns to consider later in this Consultation Paper whether they should be set within the context of a more coherent legislative framework on the hearsay rule.

2.54 The best evidence rule may, at one time, have become conflated with the hearsay rule but it is clear to the Commission that this should be avoided. Hearsay may be the "best evidence" in the sense of the best that is available, for example, if the choice is between hearsay evidence and none at all, such as may be the case where the original source of the information is deceased or cannot be located. But this is quite different from the meaning of the best evidence rule in the law of evidence.

statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination".

⁷¹ Williams *The Proof of Guilt: A Study of the English Criminal Trial* (3rd ed Stevens & Sons, London, 1963), 196, cited Bartlett *Remembering* (Cambridge 1932), reporting a series of experiments which found that the serial reproduction of a story, there were radical transgressions in the versions recounted; that incidents and events were transposed; that names and numbers rarely survived intact for more than a few reproductions; and that opinions and conclusions were reversed.

⁷² LRC CP 57-2009.

2.55 Indeed, as the English Law Commission noted in its 1997 *Report on Hearsay and Related Topics*,⁷³ in some instances hearsay may be “plainly superior to oral testimony.” The English Law Commission stated this was clearly so in the case of the business records at issue in the UK House of Lords case *Myers v DPP*.⁷⁴ Indeed, in *Myers* it was accepted that, by the time the case came to trial, the business records were clearly the “best evidence” (in the ordinary sense, rather than the legal sense) of what was known about the vehicles. But because there was no existing exception at the time to the hearsay rule under which the records could be admitted, and because the majority was not prepared to recognise a new inclusionary exception (though they called for a thorough review of the rule by the UK Parliament) they were deemed inadmissible, even though such evidence would have been more reliable than the oral recollection of the workers of what they had seen three years after the events, even if it had been possible to trace the workers and have them give sworn evidence in court and be tested by cross-examination.

2.56 Lord Reid, on the majority judges in *Myers*, recognised this:

“The whole development of the exceptions to the hearsay rule is based on the determination of certain classes of evidence as admissible and not on the apparent credibility of particular evidence tendered. No matter how cogent particular evidence may seem to be, unless it comes within a class which is admissible, it is excluded. Half a dozen witnesses may offer to prove that they heard two men of high character who cannot now be found discuss in detail the fact now in issue and agree on a credible account of it, but that evidence would not be admitted although it might be by far the best evidence available”.⁷⁵

2.57 The Commission notes here (and discusses in detail elsewhere⁷⁶) that the actual outcome in the *Myers* case has been widely criticised and that legislative changes to allow for the admissibility of such business records have been enacted in virtually every common law State (in England, as the judges in *Myers* had actually invited, virtually immediately in the *Criminal Evidence Act*

⁷³ Law Commission *Report on Evidence in Criminal Proceedings: Hearsay and Related Topics* (LC No.245). This followed the Commission’s 1995 *Consultation Paper on Evidence in Criminal Proceedings: Hearsay and Related Topics* (LC No.138). Many of the recommendations in the 1997 Report were implemented in the UK *Criminal Justice Act 2003*.

⁷⁴ [1965] AC 1001. See the discussion at paragraph 2.19ff, above.

⁷⁵ [1965] AC 1001, 1024.

⁷⁶ See paragraphs 5.04ff, below.

1965). This has occurred even where (as in Ireland) it has been doubted whether the actual outcome in *Myers* would have been followed. For present purposes it is sufficient to note that the *Myers* case indicates that the best evidence rule is distinct from the hearsay rule, a point on which there is widespread agreement. The Commission also notes here that it has addressed the best evidence rule separately in the Commission's *Consultation Paper on Documentary and Electronic Evidence*,⁷⁷ in which the Commission has provisionally recommended that the best evidence rule ought to be replaced as it applies to documentary and electronic evidence.

(2) Relevance and exclusionary rules of evidence

2.58 Relevance is a second, and perhaps even more significant, principle used to test admissibility in the law of evidence. Thus, the American writer Thayer stated:

“There is a principle – not so much a rule of evidence as a proposition – involved in the very conception of a rational system of evidence... which forbids receiving anything irrelevant, not logically probative”.⁷⁸

2.59 It has also been said that relevant and reliable evidence must always be admissible irrespective of its origin, because the object of a trial is to ascertain the facts in issue and the evidence tendered assists in the ascertainment of the facts.⁷⁹ This general proposition must, however, be tempered because as Thayer also noted relevance is not an absolute concept and it must take account of general experience.⁸⁰

2.60 In addition, despite Thayer's apparent assertion that the test for relevance can be based on ordinary everyday processes of inquiry, inference

⁷⁷ LRC CP 57-2009. As indicated in paragraph 1 of the Introduction to this Consultation Paper, the Commission intends to publish a composite Report incorporating the material in these two Consultation Papers, and also the material dealt with in its *Consultation Paper on Expert Evidence* (LRC CP 52-2008).

⁷⁸ Thayer *A Preliminary Treatise on Evidence at Common Law* (1898) 265 at 271.

⁷⁹ In a UK Privy Council case, *Kuruma v. R* [1955] AC 197, at 203, Goddard CJ stated: “the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is it is admissible and the court is not too concerned with how the evidence is obtained.” This comment, made in the specific context of the admissibility of confessions (where, even in that context, the comment is open to doubt) does not take into consideration that certain rules of evidence, including the hearsay rule, operate to exclude relevant evidence.

⁸⁰ Thayer *A Preliminary Treatise on Evidence at Common Law* (1898) 265 at 271.

and fact-finding, most writers agree that the issue of relevance as it pertains to the question of admissibility is more complex than determining whether a particular piece of evidence should be admitted into the trial provided it is “relevant” in a general sense. Thus, a piece of evidence may be relevant but may not be admitted as evidence because it does not attain the minimum threshold of cogency which the law of evidence requires.⁸¹ This is a question of law for a court (a judge or judges) and the decision is usually made both on determining whether the evidence is relevant and whether it is subject to any applicable exclusionary rule. Thus, if the evidence cannot be admitted because of an exclusionary rule, the issue of relevance is of little consequence as it will not satisfy the condition of legal admissibility.⁸²

2.61 In summary, in order to be admissible the evidence must be legally relevant and not be subject to an exclusionary rule. The American writer Wigmore argued that legal relevance as a legal concept extended beyond the ordinary meaning of logical common sense relevance. He proposed two hurdles for admissibility on the basis of relevance. First, the court must be satisfied that the evidence bears a logical relationship to an issue in the case and, secondly, that in light of the other evidence in the case, it justifies the time and cost of its reception. In other words, the evidence must have a probative value related to the facts at issue. The requirement that the probative value of the evidence must relate to an issue before the court is sometimes referred to as the requirement of “materiality”.

2.62 In England, Zuckerman has argued that “materiality” is an unnecessary concept; whether or not a certain fact can affect a legal result is not a question of evidence but of interpreting the substantive law.⁸³ On the other hand, McEwan suggested that the concept of materiality does exist independent of the effect of the substantive law; it is a creature of the adversarial nature of judicial proceedings. He stated that “[o]bjective facts and operation of law are far from being the only influences on the conduct and outcome of trials; choices made by individuals have an important part to play too.”⁸⁴

2.63 A simple articulation of legal relevance may be that relevance denotes a fact which is so connected directly or indirectly with a *fact in issue* in a case that it tends to prove or disprove the fact in issue. In other words, a relevant fact is a fact from which the existence or non-existence of a fact in

⁸¹ See Tapper *Cross and Tapper on Evidence* (9th ed Butterworths, 1999), at 56.

⁸² Roberts and Zuckerman *Criminal Evidence* (Oxford University Press 2004) 97.

⁸³ Zuckerman ‘Relevance in Legal Proceedings’ in Twining (ed) *Facts in Law* (1993).

⁸⁴ McEwan *Evidence and the Adversarial Process - The Modern Law* (1998) 36-37.

issue may be inferred. The English writer Keane has stated that if the only facts which were open to proof or disproof were facts in issue, many claims and defences would fail.⁸⁵ It is not easy in all cases to readily draw the line of legal relevance; for instance the logical relevance of the evidence must also be balanced against competing considerations affecting the efficiency and integrity of the judicial system, but confining the evidence to what is pertinent to the issue is of great importance, not only as regards the individual case but also with reference to the expediency of the trial and keeping the focus of the trial on the issues to be considered.

2.64 Wigmore's use of the term "legal relevance" has been used by judges in a number of States to filter out from cases superfluous information and in doing so promote accurate fact finding. Roberts and Zuckerman⁸⁶ have criticised it because the rejected evidence is then sometimes referred to simply as 'irrelevant', which is often an inaccurate description. They cite as an example the English case *R v Blastland*⁸⁷ where the defendant was charged with and convicted of the buggery and murder of a 12 year old boy. The defendant claimed that he had had consensual intercourse with the boy, and that the boy was unharmed when he left him. As to the murder charge, he wished to give evidence at his trial that the boy had been murdered by another named man, and also to testify that this other man had described to a woman that he was living with that 'a young boy had been murdered' before it was publicly known. At his trial, the judge ruled that this was inadmissible evidence, and this ruling was upheld by the UK House of Lords, where it was held that the exclusion was justified on the basis that it lacked 'direct and immediate relevance.' It has been argued that it is manifestly unjust to label this evidence as irrelevant (even if it was properly excluded⁸⁸) as it does not lend itself to a transparent and principled discussion of what may be categorised as 'relevant'. Instead it may be preferable to focus on examining the admissibility of evidence on a scale of its probative value. Thus, instead of continuing to retain a common sense, intuitive, approach to relevance it would be better to determine the issue of admissibility on the basis of whether it is 'substantially probative', that is, excluding evidence because its nuisance value outweighs its merit, rather than encapsulating all excluded evidence under the umbrella of irrelevance.

⁸⁵ Keane *The Modern Law of Evidence* (5th ed., Butterworths, 2000).

⁸⁶ Roberts and Zuckerman *Criminal Evidence* (Oxford University Press 2004) at 104.

⁸⁷ [1986] 1 AC 41.

⁸⁸ See Choo 'The Notion of Relevance and Defence Evidence' [1993] Crim LR 114.

2.65 In its assessment of relevance the South African Law Reform Commission stated that legal relevance requires that the probative value of the evidence outweigh any prejudice that may accrue as a result of its admission. Prejudice in this context does not refer to the possibility of a finding of fact being made against a particular party; it refers to unfair prejudice which includes not only procedural prejudice but also prejudice that arises out of the possibility of the fact finder being misled or unduly swayed by a particular item of evidence.⁸⁹

(3) Fair Procedures under the Constitution of Ireland and European Convention on Human Rights

2.66 While the courts at one time may have been less concerned with the circumstances in which evidence was obtained,⁹⁰ the concept of a fair trial, and by extension that fair procedures are adhered to, form the cornerstone of the modern civil and criminal process. The concept of fairness has become central in relation to the power of a court to exclude evidence, but it remains a contentious and elusive notion and there have been sharp disagreements in a number of countries over what fairness requires and how much weight it should carry in answering questions of admissibility.⁹¹ In Ireland the concept of fair procedures is viewed, when being applied to the law of evidence and rules of procedure, as representing an evolving value dependent on the development of the notion of fairness.⁹²

(a) Constitutional right to fair procedures and hearsay

2.67 In *Re Haughey*⁹³ the Supreme Court held that the right to fair procedures is an unenumerated⁹⁴ constitutional right under Article 40.3.1^o of the Constitution. Article 40.3.1^o provides that:

⁸⁹ South African Law Reform Commission Discussion Paper 113 *Review of the Law of Evidence (Hearsay and Relevance)* (2009) at 17. The South African Law Reform Commission noted that commentators have questioned whether the aspect of unfair prejudice should be maintained in the absence of a jury system.

⁹⁰ See Roberts and Zuckerman *Criminal Evidence* (Oxford University Press 2004) at 148, n.3.

⁹¹ Colvin 'Conceptions of Fairness in the Criminal Process' Available at <http://www.isrcl.org/Papers/Colvin.pdf>

⁹² *The State (Healy) v Donoghue* [1976] IR 325.

⁹³ [1971] IR 217.

⁹⁴ Literally, an "unstated" or "unnumbered" constitutional right; in effect, a constitutional right implied from the text of Article 40.3. See generally, Hogan and Whyte, *JM Kelly: The Irish Constitution* (4th ed LexisNexis 2003).

“The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizens.”

2.68 In the *Haughey* case the Supreme Court held that this right to fair procedures applies not only in judicial proceedings but also, as in the case itself, in the context of an Oireachtas (parliamentary) inquiry involving the applicant. The Supreme Court also held that where such an inquiry attempted to rely on evidence which might alter or affect an individual's rights, he or she was entitled to have that evidence tested directly, including by the use of cross-examination. This constitutional concept of fair procedures builds on the well-established common law concept of “natural justice,” which requires that an adjudicative body, whether a court or other similar entity, must not be biased⁹⁵ and must allow both sides in a dispute an equal opportunity to present their side of the case.⁹⁶

2.69 The decision in *Haughey* involves three important elements in the context of this Consultation Paper. First, the right to confront or to cross-examination was specifically mentioned as a component of the right to fair procedures. Secondly, perhaps even more significantly, by deciding that the right to fair procedures was a constitutional right, the Court held that legislation which attempted to prevent the ability to confront, including the legislation involved in the case itself, could be constitutionally open to doubt. Thirdly, the decision in *Haughey* was not limited to civil or criminal court proceedings but specifically involved any adjudicative processes where a person's rights are at issue. In subsequent cases, the Irish courts have addressed the precise manner in which the right to fair procedures impacts on the hearsay rule. The Commission discusses below four decisions of the Supreme Court that have a direct bearing on this, beginning with *Kiely v Minister for Social Welfare (No.2)*⁹⁷ and culminating most recently in *Borges v Medical Council*.⁹⁸

2.70 The key elements in the *Haughey* case were reinforced in *Kiely v Minister for Social Welfare (No.2)*⁹⁹ where the constitutional dimension to the hearsay rule was at issue. In this case, the plaintiff had applied to the Department of Social Welfare (now the Department of Social and Family Affairs)

⁹⁵ Summarised in the phrase *nemo iudex in causa sua*: no person should be a judge in their own case.

⁹⁶ Summarised in the phrase *audi alteram partem*: hear the other side.

⁹⁷ [1977] IR 267.

⁹⁸ [2004] IESC 9; [2004] 1 IR 103.

⁹⁹ [1977] IR 267.

for a death benefit under the *Social Welfare (Occupational Injuries) Act 1966*.¹⁰⁰ At an oral hearing before a social welfare appeals officer, the appeals officer decided that the medical witnesses for the plaintiff were required to give evidence on oath and to submit themselves to cross-examination, while he received other medical evidence which came to an adverse conclusion on her claim in the form of a letter, and denied the plaintiff's legal adviser an opportunity of cross-examining that medical evidence. The appeals officer dismissed the plaintiff's claim on the grounds set out in the written opinion which had not been available for cross-examination. The Supreme Court held that the decision-making process was in breach of the right to fair procedures under Article 40.3 of the Constitution. In a passage that has been quoted many times since then,¹⁰¹ Henchy J stated:¹⁰²

"This Court has held, in cases such as *In re Haughey* [1971] IR 217, that Article 40, s. 3, of the Constitution implies a guarantee to the citizen of basic fairness of procedures. The rules of natural justice must be construed accordingly. Tribunals exercising quasi-judicial functions are frequently allowed to act informally – to receive unsworn evidence, to *act on hearsay*, to depart from the rules of evidence, to ignore courtroom procedures, and the like – *but they may not act in such a way as to imperil a fair hearing or a fair result...*

Of one thing I feel certain, that natural justice is not observed if the scales of justice are tilted against one side all through the proceedings. *Audi alteram partem* means that both sides must be fairly heard. *That is not done if one party is allowed to send in his evidence in writing, free from the truth-eliciting processes of a confrontation which are inherent in an oral hearing, while his opponent is compelled to run the gauntlet of oral examination and cross-examination.* The dispensation of justice, in order to achieve its ends, must be even-handed in form as well as in content. Any lawyer of experience could readily recall cases where injustice would certainly have been done if a party or a witness who had committed his evidence to writing had been allowed to stay away from the hearing, and the opposing party had been confined to controverting

¹⁰⁰ Now the *Social Welfare Consolidation Act 2005*.

¹⁰¹ The Commission quoted part of this passage from Henchy J's judgment in its 1980 *Working Paper on the Rule Against Hearsay* (LRC WP 9-1980), p.3, and it has regularly cited with approval by the High Court and Supreme Court, including in *Borges v Medical Council* [2004] IESC 9; [2004] 1 IR 103, discussed below.

¹⁰² *Kiely v Minister for Social Welfare (No.2)* [1977] IR 267, at 281-282 (emphasis added).

him simply by adducing his own evidence. In such cases it would be cold comfort to the party who had been thus unjustly vanquished to be told that the tribunal's conduct was beyond review because it had acted on logically probative evidence and had not stooped to the level of spinning a coin or consulting an astrologer.¹⁰³ Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice."

2.71 The decision in the *Kiely* case is of great significance to the analysis of the hearsay rule from a constitutional perspective. It clearly establishes that adjudicative procedures which involve an "oral v written" imbalance in terms of how evidence is assessed are not constitutionally permissible. It also establishes that oral hearings must involve both parties having an opportunity to confront and cross-examine each other's evidence, or at the least not to involve an imbalance where one side, but not the other, is given this opportunity. Nonetheless, Henchy J also points out in the *Kiely* case that adjudicative bodies such as social welfare appeals officers are permitted "to act on hearsay... but... not... in such a way as to imperil a fair hearing or a fair result." In that respect, it can be said that Henchy J acknowledges that the use of hearsay does not, in itself, imperil a fair hearing: the objection to its use in the *Kiely* case was the imbalanced manner of its use.

2.72 The next decision of the Supreme Court of importance in this context is *Murphy v GM*.¹⁰⁴ In this case, the Supreme Court upheld the constitutionality of the provisions of the *Proceeds of Crime Act 1996* which provide for the forfeiture of the proceeds of crime on foot of court orders made by the High

¹⁰³ This phrase echoed (but rejected) the comments of Diplock LJ in the English case *R v Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456, at 488, where he stated: "The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above." Henchy J clearly rejected the view that it was sufficient that an adjudicative body had acted on material having a "probative value."

¹⁰⁴ [2001] 4 IR 113.

Court after applications to the court by the Criminal Assets Bureau.¹⁰⁵ In finding the 1996 Act constitutionally valid, the Supreme Court accepted that the procedures involved in the 1996 Act were civil in nature, not criminal. The Court stated:¹⁰⁶

“It is almost beyond argument that, if the procedures under... the 1996 Act constituted in substance, albeit not in form, the trial of persons on criminal charges, they would be invalid having regard to the provisions of the Constitution. The virtual absence of the presumption of innocence, the provision that the standard of proof is to be on the balance of probabilities and *the admissibility of hearsay evidence* taken together are inconsistent with the requirement in Article 38.1 of the Constitution that “no person shall be tried on any criminal charge save in due course of law.”

2.73 As in the *Kiely* case, while this passage does not state that the admissibility of hearsay evidence would, on its own, render a criminal trial unconstitutional, it provides a clear warning that any significant change to the hearsay rule in criminal cases would raise at least a yellow flag in constitutional terms. Indeed, other case law demonstrates that the right to fair procedures under Article 40.3, which has also been referred to as “constitutional justice” is of high importance in the criminal trial process. As Walsh notes¹⁰⁷ this is clearly reflected in the judgment of O’Higgins CJ in the Supreme Court decision *The State (Healy) v Donoghue*¹⁰⁸ where he stated that the concept of justice derived under the Constitution “must import not only fairness and fair procedures, but also [have] regard to the dignity of the individual”.¹⁰⁹

2.74 The fundamental concepts of justice as set out by O’Higgins CJ in *Healy* confirm that rules and procedures will not avoid constitutional challenge simply because they are authorised by a statutory enactment or by a common law rule.¹¹⁰ In *Goodman International v Hamilton (No.1)*¹¹¹ the applicant, who had been called as a witness by a tribunal of inquiry having the powers conferred by the *Tribunals of Inquiry (Evidence) Act 1921* (as amended), argued

¹⁰⁵ The 1996 Act largely followed the recommendations made by the Commission in its 1991 *Report on Confiscation of the Proceeds of Crime* (LRC 35-1991).

¹⁰⁶ [2001] 4 IR 113, at 135-6 (emphasis added).

¹⁰⁷ Walsh *Criminal Procedure* (Thompson Round Hall 2002) at 6.

¹⁰⁸ [1976] IR 325.

¹⁰⁹ *Ibid* at 348-349.

¹¹⁰ Walsh *Criminal Procedure* (Thompson Round Hall 2002) at 7.

¹¹¹ [1992] 2 IR 542.

that the tribunal could not investigate allegations of criminal conduct. He argued that, to do so, would infringe the guarantee of fair procedures under Article 40.3, would involve the tribunal carrying out the “administration of justice” (which only courts may do under Article 34.1), and would amount to conducting a criminal trial, contrary to Article 38. Each of these grounds were, in fact, rejected by the Supreme Court, which held that the functions of a tribunal under the 1921 Act were, essentially, ones of “fact finding” and could not, therefore, be regarded as constituting the “administration of justice” under Article 34 or conducting a criminal trial under Article 38.¹¹²

2.75 The applicant had also argued that all the rules of evidence which apply to court proceedings should apply to the proceedings of a tribunal under the 1921 Act.¹¹³ In the High Court, Costello J stated that there was no rule of law which requires a tribunal of inquiry to apply the rules of evidence applicable in a court of law. He added:¹¹⁴

“The acceptance of evidence and the weight to be given to it is a matter for the Tribunal. But it is subject to the requirements of fair procedures and should, for example, a question arises as to the receipt of hearsay evidence, the Tribunal *might be required to hear persons affected on the point.*”

2.76 On appeal, the Supreme Court held that, while a tribunal of inquiry was not required to apply all the rules of evidence, it recognised that the constitutional right to fair procedures required adherence to many of the rules of evidence, including the right to confront and cross-examination. As with the previous Supreme Court decisions discussed above, it is clear that the *Goodman* case placed a special premium on the hearsay rule, though without suggesting that it must be applied with the same rigour as might be required in court proceedings (Costello J noting that “the Tribunal might be required to hear persons affected” where hearsay was being received in evidence).

2.77 The final Supreme Court decision to which the Commission draws attention is *Borges v Medical Council*.¹¹⁵ In this case, the applicant applied to the High Court for judicial review of the manner in which an inquiry into his fitness to practise as a medical practitioner was being conducted by the Fitness to Practice Committee of the Medical Council. The applicant had been served by the Registrar of the Medical Council with a notice of intention to hold an

¹¹² *Ibid* at 588.

¹¹³ *Ibid* at 564.

¹¹⁴ *Ibid* at 565 (emphasis added).

¹¹⁵ [2004] IESC 9; [2004] 1 IR 103.

inquiry under the *Medical Practitioners Act 1978* (since replaced by the *Medical Practitioners Act 2007*) in relation to allegations made by two complainants, whom it had initially been intended would be called as witnesses. The complainants, who were both Scottish women, had previously made allegations to the UK General Medical Council of professional misconduct against the applicant concerning his work as a doctor in Scotland. These allegations had been investigated by the Professional Conduct Committee of the UK General Medical Council in an oral hearing in which the applicant had challenged the two women's evidence and had argued that he had at all times behaved in a professional manner. The Professional Conduct Committee of the UK General Medical Council had concluded that the allegations were true and had constituted professional misconduct under the relevant legislation in the UK. On appeal by the applicant to the UK Judicial Committee of the Privy Council, this decision had been upheld.¹¹⁶

2.78 Before the hearing began in Ireland against the applicant under the 1978 Act, the Registrar of the Medical Council applied to the Fitness to Practice Committee of the Medical Council to allow the hearing proceed without calling the complainants as witnesses. Instead, the Registrar proposed to introduce in evidence a transcript of the proceedings before the Professional Conduct Committee of the UK General Medical Council, the report of the decision of the Professional Conduct Committee and the judgment on appeal of the UK Judicial Committee of the Privy Council upholding the committee's findings of professional misconduct. This appears to have been because the two women were not compellable witnesses and may have been unwilling to travel from Scotland to testify. The Fitness to Practice Committee had decided to proceed with the inquiry under the 1978 Act on that basis, and at that stage the applicant applied for judicial review to prevent the hearing going ahead on the basis proposed by the Registrar. The High Court and, on appeal, the Supreme Court accepted the arguments made by him and made orders prohibiting the hearing if it proceeded on the basis proposed by the Registrar.

2.79 The Fitness to Practice Committee had argued that it was not in the same position as a court and was entitled to admit evidence which might otherwise be excluded under the hearsay rule. It also argued that the evidence of the complainants, although given before another tribunal, was properly admissible under the inclusionary exceptions to the hearsay rule, in particular the exceptions that had been developed in recent case law in other jurisdictions,

¹¹⁶ *Borges v General Medical Council* [2001] UKPC 31 (31 August 2001), available at <http://www.privacy-council.org.uk/output/Page50.asp>.

notably by the Supreme Court of Canada.¹¹⁷ It was argued that these cases demonstrated that hearsay evidence of the kind involved in the present case was admissible provided it met two requirements of “necessity” and “reliability.” In the present case, it was argued that both requirements had been met; the reliability requirement being satisfied because the statements had been made in circumstances which provided sufficient guarantees of their trustworthiness; and that the High Court judge who had dealt with the case had erred in not considering whether they should be admitted by invoking the test of necessity, it being clear that the Medical Council could not compel the attendance of the witnesses concerned.¹¹⁸

2.80 In response, the applicant argued that the Canadian cases relied on by the Medical Council were not applicable because those cases had involved witnesses who were unavailable to give evidence because they were dead or otherwise unable to give evidence because of limited mental capacity. They could not be relied on in a case such as the present where the witnesses were simply unwilling to give evidence. In addition, this, unlike some of the authorities relied on, was not a case in which there was any evidence other than that of the complainants. To permit the Fitness to Practice Committee to proceed in those circumstances on the basis of the transcripts would have the result not merely of admitting hearsay evidence in circumstances which came within none of the established exceptions but of negating the constitutional right of the applicant to cross-examine his accusers.¹¹⁹

2.81 Delivering the main judgment in the Supreme Court, Keane CJ stated that it was not in dispute that the applicant had an entitlement to have the hearing conducted in accordance with fair procedures and natural justice. He noted that since the decision in *Kiely v Minister for Social Welfare (No.2)*¹²⁰ it was clear that (as Henchy J emphasised in his judgment in *Kiely*, quoted above) while inquiries of this nature are not subject to the same rigours of following the rules of evidence as a court is, in that they may act on the basis of unsworn or hearsay evidence, nonetheless they are constrained from acting in a way which is inconsistent with the basic fairness of procedures guaranteed by Article 40.3

¹¹⁷ Counsel cited the decisions of the Supreme Court of Canada in *R. v Khan* [1990] 2 SCR 531 and *R. v Hawkins* [1996] 3 SCR 1043, and the minority opinions of Lord Donovan and Lord Pearce in the UK House of Lords in *Myers v DPP* [1965] AC 1001.

¹¹⁸ [2004] IESC 9; [2004] 1 IR 103, 111.

¹¹⁹ *Ibid* at 112.

¹²⁰ [1977] IR 267.

of the Constitution.¹²¹ Keane CJ also stated that basic fairness of procedures required that the applicant be given an opportunity to cross-examine his accusers in a situation where an allegation of conduct reflects on his good name or reputation.¹²² Keane CJ referred to the English cases *General Medical Council v Spackman*¹²³ and *Re a solicitor*¹²⁴ where it had been held that the finding of another court or tribunal could be admitted in evidence and given such weight as the relevant disciplinary tribunal thought appropriate. Keane CJ noted, however, that these decisions had involved the admissibility of those findings in the context of the rules of evidence concerning the admissibility of public documents; but the issue of whether their admission as hearsay evidence would offend the principles of fairness stemming from natural justice had not been considered in those cases.¹²⁵ In the particular circumstances of the present case, Keane CJ stated:¹²⁶

“It is sufficient to say that the applicant cannot be deprived of his right to fair procedures, which necessitate the giving of evidence by his accusers and their being cross-examined, by the extension of the exceptions to the rule against hearsay to a case in which they are unwilling to testify in person”.

2.82 Although Keane CJ concluded that the process proposed in the *Borges* case failed to comply with principles of fair procedures, he also clearly accepted that no rigid rule on the use of hearsay was being set down. He stated:¹²⁷

“Insofar as [the Medical Council’s] submission proceeds on the basis that the principle laid down in *In re Haughey* does not, in every case, preclude a court or tribunal from admitting an out of court statement notwithstanding the rule against hearsay, because the maker of the statement is not available for cross-examination, it is undoubtedly correct. To hold otherwise would be to ignore the enormous body of jurisprudence which has been built up in many common law jurisdictions in order to ensure that the rule against hearsay is not so rigidly applied in every case as to result in injustice.”

¹²¹ [2004] IESC 9; [2004] 1 IR 103, 113.

¹²² *Ibid.*

¹²³ [1943] AC 627.

¹²⁴ [1992] 2 WLR 552.

¹²⁵ [2004] IESC 9; [2004] 1 IR 103, 116.

¹²⁶ *Ibid* at 119.

¹²⁷ *Ibid* at 117.

2.83 In this respect, the *Borges* case is consistent with the approach taken in all the Supreme Court decisions since *In re Haughey*, including those discussed above, that hearsay evidence *may* be used by adjudicative bodies, provided that its use does not involve breaching fundamental principles of fair procedures. It is also clear that the courts see the hearsay rule as an important rule of evidence, but as Keane CJ also noted in *Borges* the law must avoid it being used in a rigid manner because that could also “result in injustice.” To that extent, the decision in *Borges* implicitly supports the need for some inclusionary exceptions to the hearsay rule. Indeed, Keane CJ discussed the admittedly more expansive approach shown in the case law of the Supreme Court of Canada and, while not prepared to develop the inclusionary exceptions to the level done in Canada, he accepted that inclusionary exceptions to the hearsay rule were consistent with the right to fair procedures. The Commission also notes that Keane CJ’s reluctance to engage in wide-ranging judicial development of the hearsay rule echoes the view expressed by the Court of Criminal Appeal in *The People (DPP) v Marley*¹²⁸ (whose judgment had been delivered by Keane J) indicating that legislative reform of the rule was preferable to judicial reform. In summary, therefore, the Commission concludes that Keane CJ contemplated some inclusionary exceptions to the hearsay rule, though not necessarily the increasing number envisaged by the Supreme Court of Canada.

(b) Fair procedures and the right to confront in criminal trials

2.84 The right to fair procedures in Article 40.3 of the Constitution interacts in the context of criminal trials with the requirement under Article 38.1 of the Constitution that criminal trials must be conducted “in due course of law.” This phrase has been compared with the “due process” requirement under the federal United States Constitution. A well-established component of a criminal trial is the right of the accused to cross-examine witnesses, also referred to as the right of confrontation. This right was specifically included as the Sixth Amendment to the US Constitution.¹²⁹ The United States Supreme Court has

¹²⁸ [1985] ILRM 17, discussed at paragraphs 5.05ff, below, where the Court referred to the proposals for reform made by the Commission in its 1980 *Working Paper on the Rule Against Hearsay* (LRC WP 9-1980). Similarly, in *The People (DPP) v Prunty* [1986] ILRM 716, the Court of Criminal Appeal (whose judgment was delivered by McCarthy J) indicated that reform of the hearsay rule was primarily a matter for the Oireachtas. The *Marley* and *Prunty* cases were referred to in the Commission’s 1987 *Report on Receiving Stolen Property* (LRC 23-1987), which recommended reform concerning the admissibility of business records, and this was implemented in the *Criminal Evidence Act 1992*.

¹²⁹ The Sixth Amendment to the US Constitution, which derives from the common law right of confrontation, provides: “In all criminal proceedings the accused shall

not interpreted the right of confrontation as a constitutional entrenchment of the common law hearsay rule, and so there is no blanket prohibition in US law on the use of hearsay evidence against an accused.¹³⁰ Rather, it has interpreted it as a right to cross-examine a witness against the accused in open court.¹³¹ Unless the accused or his or her legal representatives have the opportunity to cross-examine the maker of a statement that is tendered at trial in substitution for oral evidence, the evidence is inadmissible.¹³² In *Crawford v Washington*¹³³ Scalia J, writing the majority judgment of the US Supreme Court, stated that admitting statements deemed reliable by a judge is fundamentally at odds with the right to confrontation. He added that the ultimate goal of the Sixth Amendment is to ensure the reliability of evidence but this is a procedural rather than a substantive guarantee. It requires not that the court determine that the evidence is reliable, rather that its reliability be assessed by testing it in the crucible of cross-examination. In *Crawford* the Court held that a hearsay statement cannot be admitted unless, firstly, the accused has been given an opportunity to confront the witness at some stage, even if not at trial (for example at a preliminary hearing); and, secondly it must be shown that the witness is unavailable to give evidence at trial.

2.85 In Ireland, in *Re Haughey*,¹³⁴ which, as already noted, involved an Oireachtas (parliamentary) inquiry, the Supreme Court referred to the importance of cross-examination in the context of the right to fair procedures in Article 40.3 of the Constitution. The Court noted that the evidence in this context had been given on affidavit, instead of orally as would be common in a criminal trial, and that the applicant had therefore been denied an opportunity to cross-examine the witnesses who had given evidence. Ó Dálaigh CJ stated that an accused person has a right to cross-examine every witness for the prosecution, subject, in respect of any question asked, to the court's power to disallow on the ground of irrelevancy.

2.86 The Supreme Court also held that an accused, in advance of cross-examination, cannot be required to state the purpose of cross-examination.¹³⁵ In

enjoy the right... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour.”

¹³⁰ See *Murphy Murphy on Evidence* (10th ed Oxford University Press 2007) at 7.5.

¹³¹ *Turner v Louisiana* 379 US 466 (1965).

¹³² This is the case regardless of the nature of the statement.

¹³³ 541 US 36 (2004).

¹³⁴ [1971] IR 217.

¹³⁵ *Ibid* at 261.

*The State (Healy) v Donoghue*¹³⁶ the Supreme Court confirmed that the right to cross-examination is integral to the criminal trial process, as it is accorded protection under Article 38 of the Constitution. O’Higgins CJ stated that it is clear that the words “due course of law” in Article 38 make it mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures applied shall be fair, and that the person accused will be afforded every opportunity to defend himself. He added that, if this were not so, the State would have failed to vindicate the personal rights of the accused. He acknowledged that a person charged must be accorded certain rights which include the right to “test by examination the evidence offered by or on behalf of his accuser”.¹³⁷

2.87 In *Donnelly v Ireland*¹³⁸ the Supreme Court held that the right of the accused to cross-examine (or confront) did not in all circumstances extend to a right to physical confrontation with an accuser and, consequently, there was no such constitutional right. The Court decided that the circumstances in which physical confrontation was denied to an accused was a matter for the Oireachtas and did not require case-by-case determination. In *Donnelly* the applicant had been convicted on a charge of a sexual offence involving a young girl, who had given evidence using a live video-link, as permitted by the *Criminal Evidence Act 1992*. The applicant argued that these provisions of the 1992 Act were unconstitutional on the ground that they infringed his right to have his counsel cross-examine or confront the complainant in the presence of the jury. The Court dismissed the claim, holding that the 1992 Act sufficiently protected and vindicated the right to a fair trial and that the judge and jury had the opportunity to scrutinise the witness while she was under cross-examination.

(c) The forensic value of cross-examination

2.88 Cross-examination may have been hailed as the “greatest legal engine ever invented for the discovery of truth”¹³⁹ but there are those that are sceptical of the value of cross-examination as a legal engine for uncovering the truth. The Commission has already noted that many leading judges have doubted whether they are sufficiently “lynx-eyed” to distinguish at all times between witnesses who tell the truth and those who do not.¹⁴⁰ Similarly, the Australian Law Reform Commission (ALRC) in its Research Paper *Manner of*

¹³⁶ [1976] IR 325.

¹³⁷ [1976] IR 325 at 349.

¹³⁸ [1998] 1 IR 321.

¹³⁹ Wigmore *Evidence in Trials at Common Law* (3rd ed Little Brown & Co., 1974).

¹⁴⁰ See paragraph 1.15, above.

*Giving Evidence*¹⁴¹ concluded that cross-examination is arguably the poorest of the techniques employed for this purpose. The ALRC stated that it might be noted in support of cross-examination that, by revealing inconsistencies and highlighting errors, it could assist in identifying dishonest witnesses. It suggested that this may not be the case; the witness may be an honest one and is making inaccurate statements in response to suggestive leading questions, the stress of the courtroom scenario or many other reasons. The ALRC therefore concluded that the mere technique of cross examination does not assist in identifying which of the evidence is false.¹⁴² The ALRC also noted that the New South Wales Law Reform Commission has taken issue with Wigmore's assessment. It has said that it is ill-suited for certain types of witnesses,¹⁴³ there is a risk of distortion and the ALRC stated that the research it had conducted indicated some serious doubts on the use of cross-examination as a mechanism for the discovery of the truth.¹⁴⁴ It argued that cross-examination is of little utility in cases where the evidence comprises, for example, computer or automated documents or where the person who generated the records cannot be identified.¹⁴⁵ Thus, as these cases indicate that cross-examination may not materially affect truth-discovery, the absence of cross-examination as an underlying reason for excluding hearsay may not have great strength in such situations.

2.89 Research conducted from a behavioural science perspective has also suggested that cross-examination is a defective technique for discovering the truth about past events.¹⁴⁶ There are a number of factors which are said to be questionable about the effectiveness of examination-in-chief followed by cross-examination: the danger in the delay of giving the account; the artificial manner of giving evidence rather than an open-ended narrative form and the

¹⁴¹ No. 8 (1982) at 189.

¹⁴² *Ibid.*

¹⁴³ Persons not fluent in English, young children and persons with limited mental capacity.

¹⁴⁴ Australian Law Reform Commission *Report on Manner of Giving Evidence* No. 8 (1982) at 187.

¹⁴⁵ Roberts tersely sums up the irrelevance of Wigmore's assessment of cross-examination to discovery of the truth in the modern trial and states that "it is more likely to be cited as evidence of the legal profession's collective self-delusion, than as a serious proposition about the way to best discover the truth about past events." Roberts *Criminal Evidence* (Oxford University Press 2004) at 215.

¹⁴⁶ *Ibid.*

unfamiliarity of the court process, which may heighten stress for some witnesses.

2.90 The argument advanced that cross-examination is the best method to test the veracity of evidence is arguably not as significant today as it was at a time when the modern jury trial was in its infancy, where the role of the juror and the witness was conflated and needed to be separated. Today, especially in civil proceedings, the vast majority of cases are conducted without a jury and a more literate and technologically advanced society provides, and depends on, more reliable methods of keeping track of what has happened than can possibly be provided by the unassisted recollection of witnesses, even if their account of events is exposed to the rigour of cross-examination.¹⁴⁷ There are undoubtedly some cases in which cross-examination provides a means of arriving at a sound evidential basis for establishing proof in a specific setting. The Commission acknowledges, however, that cross-examination has its limits and that, in this respect, the absence of the ability to cross-examine a witness cannot in all cases justify the exclusion of all hearsay – if this was the case, there would, of course, be no exceptions to the exclusionary hearsay rule.

2.91 In conclusion, bearing in mind these comments and reservations, it is sufficient that the Commission notes that the right to cross-examine is one of the foundations for the hearsay rule and that the right of confrontation forms an important component of the criminal trial under the Irish Constitution and at common law.

2.92 Before drawing together its overall conclusions on the relationship between the right to fair procedures and the hearsay rule, the Commission turns to discuss the case law developed by the European Court of Human Rights under the European Convention in Human Rights on the issue of fair procedures.

(d) Fair procedures and the European Convention on Human Rights

2.93 Ireland was one of the first States to ratify the 1950 European Convention on Human Rights. The *European Convention on Human Rights Act 2003*, enacted in the wake of the 1998 Belfast (Good Friday) Agreements, gave the rights in the Convention the force of law in the State, subject to the Constitution. Under section 3 of the 2003 Act all organs of the State, including the courts, are required to carry out their functions in a manner compatible with the State's obligations under the Convention and with due regard for the decisions of the European Court of Human Rights on the interpretation of the Convention.

¹⁴⁷ Tapper *Cross and Tapper on Evidence* (9th ed Butterworths 1999) at 535.

2.94 In terms of the connection between the Convention and the law of evidence, the European Court of Human Rights has emphasised that the admissibility of evidence is primarily a matter for regulation by national law and that, as a general rule, it is for the national court to assess the evidence before it. The European Court of Human Rights has repeatedly rejected complaints alleging errors in the assessment of evidence by national courts. Such questions fall outside the competence of the Court unless the matter amounts to a violation of the rights in the Convention. Thus, the treatment by the European Court of Human Rights of the principles of fair procedures under the Convention is limited and, in line with its general approach to reviewing national laws, allows each State a “margin of appreciation” in deciding whether there is a breach of the Convention. The Court has stated, for example, that its task under the Convention is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair.¹⁴⁸

2.95 The Convention and the European Court of Human Rights cannot regulate the operation of the rules of evidence in a member State nor does the Convention directly affect the content of the evidence law of a State. The Convention does however, guarantee the right to a fair trial, thus providing a context within which the rules of evidence must be made and operate within.

2.96 Article 6(1) of the European Convention on Human Rights, which deals with both civil and criminal proceedings, states:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

2.97 Article 6(3)(d), which deals with the right to confront in criminal cases only, provides:

(3) Everyone charged with a criminal offence has the following minimum rights... (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

2.98 The European Court of Human Rights has held that it is a requirement of justice that the accused in a criminal trial is entitled to face his or her opponents and that the right to confrontation should be recognised as a

¹⁴⁸ *Teixeira de Castro v. Portugal* (1998) 28 EHRR 101.

basic principle of the law of evidence. Thus, in *Van Mechelen v Netherlands*¹⁴⁹ the Court stated:

“[A]ll the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3(d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage”.

2.99 The English writer Murphy notes that the words *to examine or have examined witnesses against him* draws attention to two dangers associated with hearsay: first, that the repetition of any statement involves the inherent danger of error or distortion and, second, that it is virtually impossible to cross-examine a witness who is testifying about a hearsay statement where he or she did not perceive the events in question.¹⁵⁰ Murphy adds that, for the most part, the hearsay rule applies both to evidence tendered by the prosecution and the defence but that Article 6(3)(d) requires that the admission of hearsay against the accused be scrutinised with a view to ensuring the overall fairness of the trial.¹⁵¹ Osbourne argues that, at first sight, Article 6(3)(d) appears to impose a strict rule against the use of hearsay evidence by the prosecution¹⁵² but that the relevant case law the European Court of Human Rights has tended to take the view that the key issue is not the admissibility of hearsay but whether the accused had an opportunity to avail of the right to examine the witnesses at some point during proceedings. This appears to be comparable to the approach taken by the US Supreme Court in respect of the US Constitution's Sixth Amendment right to confrontation.¹⁵³

2.100 *Unterpertinger v Austria*¹⁵⁴ concerned hearsay statements admitted at the applicant's trial. He had been charged with actual bodily harm to his wife and stepdaughter. A report prepared by the Austrian police included statements by the accused, the two complainants and a doctor. Under the Austrian Code of Criminal Procedure members of an accused's family are not compellable

¹⁴⁹ (1998) 25 EHRR 647, 673 at paragraph 51.

¹⁵⁰ Murphy *Murphy on Evidence* (10th ed Oxford University Press 2007) at 7.2.

¹⁵¹ *Ibid* at 7.5.

¹⁵² Osbourne 'Hearsay and the European Court of Human Rights' (1993) Crim LR 255, at 261.

¹⁵³ See paragraphs 2.49ff, above.

¹⁵⁴ (1991) 13 EHRR 175.

witnesses; his wife had attended a preliminary investigation and had given evidence of the assaults to the judge but, at the trial both complainants had refused to testify. The Austrian court then allowed the record of the wife's statement to be read out and the investigation file was also read to the court.¹⁵⁵ The accused was convicted, his appeal dismissed and he claimed that the acceptance of written evidence of the interviews infringed Articles 6(1) and 6(3)(d), contending that his inability to have the alleged victims cross-examined was a breach of the Convention. The European Court of Human Rights held that, while there were other documents which the national court had before it to assist it to arrive at the truth, including the accused's criminal records and his own testimony, the conviction appeared to have been substantially based on the statements of the alleged victims and this constituted a breach of Article 6. The Court added that the reading of statements where it was not possible to examine the witness cannot be regarded as inconsistent with Article 6(1) and (3)(d) of the Convention, but that the use made of them must comply with the rights of the defence, which Article 6 is intended to protect.¹⁵⁶ The Court went on to say that this is especially so where the person 'charged with a criminal offence' who has a right under article 6(3)(d) 'to examine or have examined witnesses' against him has not had an opportunity at an earlier stage in the proceedings to question the persons whose statements are read out at the hearing.

2.101 In *Kostovski v Netherlands*¹⁵⁷ the accused was convicted of armed robbery. The conviction was based to a decisive degree on the reports of statements by two anonymous witnesses interviewed by the police in the absence of the accused or his legal advisors, and in one case by an examining magistrate at an earlier stage. The Court stressed that it was not its task to express a view on whether statements were correctly admitted and assessed by the trial court but to ascertain whether the proceedings as a whole including the way in which evidence was taken were fair. It held that in principle all the evidence had to be produced in the presence of the accused at a public hearing with a view to cross-examination, although statements obtained at a pre-trial

¹⁵⁵ This is permitted under the Austrian Code of Criminal Procedure and comprised the police reports of the incidents, the accused's criminal record and various witness statements.

¹⁵⁶ Osbourne remarks that the meaning of this is opaque unless it simply means that the reading out of the evidence is in order (that is, examination-in-chief may be dispensed with) provided that the witnesses are present at the trial and there is an opportunity for cross-examination. Osbourne 'Hearsay and the European Court of Human Rights' (1993) Crim LR 255, at 262.

¹⁵⁷ (1990) 12 EHRR 434.

stage could be used as evidence, “provided the rights of the defence were respected.” As a rule, those rights would require that the accused have at some stage a proper opportunity to challenge and question a witness against him. That opportunity had not been provided to the applicant.

2.102 In *Windisch v Austria*¹⁵⁸ the accused was convicted of aggravated burglary on the basis of the evidence of two witnesses who were permitted to maintain their anonymity. The trial court found the absent witnesses to be reliable and convicted the accused. The European Court of Human Rights held that, despite the legitimate interests in preserving anonymity of police informers and notwithstanding that the collaboration of the public with the police is of great importance, the subsequent use of their statements in a trial is quite a different matter from the use of anonymous information at the investigation stage. There was a breach of Article 6(3)(d) as the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed.

2.103 The principle of the right of the defence to cross-examine the witnesses against it was reiterated in *Luca v Italy*¹⁵⁹ where the Court stated:

“If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene article 6.1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by article 6 .”

2.104 It is evident from the case law of the European Court of Human Rights that the Convention does not completely prohibit the admission of hearsay as evidence. Indeed the signatories to the Convention have disparate legal systems and, in some, legislation provides expressly for the use of hearsay evidence. Nonetheless, the European Court of Human Rights has emphasised that hearsay evidence should be regarded as inferior to evidence given by a witness who can be examined and cross-examined in the course of the proceedings. The Court has indicated that hearsay evidence should only be admitted where there is no alternative, so that the accused can receive a fair trial. In summary, it appears that the admissibility of hearsay evidence does not offend the spirit of the European Convention on Human Rights provided that the manner in which the evidence is received by the court is compatible with the

¹⁵⁸ (1991) 13 EHRR 281.

¹⁵⁹ (2003) 36 EHRR 46 at paragraph 40.

requirements of a fair trial under Article 6. In considering what is a fair trial the Court applies a variety of concepts, including proportionality, equality of arms and the margin of appreciation.¹⁶⁰ It would not be correct to conclude that the use of hearsay evidence adduced by the prosecution will in every circumstance be a breach of Article 6(3)(d). Thus, in *Asch v Austria*¹⁶¹ the Court held that normally all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial cross-examination, but that this might take place at a pre-trial stage. It concluded that since the applicant had had the opportunity to comment on the complainant's version of events and to put forward his own version and call his own evidence, and the hearsay statements were not the only items of evidence, there had been no breach of Article 6.¹⁶²

(e) *Al-Khawaja and Horncastle cases*

2.105 The interaction between the use of hearsay and Article 6 came into sharp relief in two recent UK-based decisions, *Al-Khawaja and Tahery v United Kingdom*¹⁶³ and *R v Horncastle and Others*.¹⁶⁴

2.106 In *Al-Khawaja and Tahery v United Kingdom*¹⁶⁵ both defendants had been convicted on a single piece of hearsay. The first applicant, a consultant physician was charged on 2 counts of indecent assault on 2 female patients. One of the complainants had made a statement to the police after the alleged assault but she had died by the time of the trial. A preliminary hearing determined that her statement was admissible evidence and the applicant was convicted on the contents of this statement. The evidence was admitted under an exception to the hearsay rule in the *Criminal Justice Act 1988*¹⁶⁶ which provides for the admission of first hand documentary hearsay in a criminal trial. The second applicant was convicted of a stabbing on the statement of a single witness. At the trial the prosecution made an application for leave to read this

¹⁶⁰ Osbourne 'Hearsay and the European Court of Human Rights' (1993) Crim LR 255, at 259.

¹⁶¹ (1993) 15 EHRR 597.

¹⁶² Two of the judges dissented from this view, and considered that the case was, in effect, indistinguishable from *Unterpinger v. Austria* (1986) 13 EHRR 175 and concluded that the accused was convicted on the basis of testimony in respect of which his defence rights were restricted.

¹⁶³ [2009] ECHR 26766/05 and 22228/06.

¹⁶⁴ [2009] UKSC 14 (9 December 2009).

¹⁶⁵ [2009] ECHR 26766/05 and 22228/06.

¹⁶⁶ Section 23 *Criminal Justice Act 1988*.

witness's statement to the Court pursuant to the *Criminal Justice Act 2003*¹⁶⁷ on the grounds that the witness was too fearful to attend the trial before the jury and should be given special measures. The trial judge heard evidence regarding the witness's fear and ruled that the statement should be read to the jury. The trial judge held that there would be unfairness if the statement was excluded and he was equally satisfied that there would be no unfairness caused by its admission. He also remarked that the challenge of a statement does not always come from cross-examination but can be caused by rebuttal.

2.107 It has been noted that the reforms to the hearsay rule contained in the 1988 and 2003 Acts work on the premise that if hearsay evidence is admissible it has the same potential weight as oral evidence and it is open to the court to convict on it, even if it stands alone.¹⁶⁸ The defendants had appealed their convictions to the English Court of Appeal on the ground that the statements breached articles 6(1) and (3)(d) of the Convention. The Court of Appeal dismissed the appeal, holding that while evidence must normally be produced at a public hearing and as a general rule articles 6(1) and (3)(d) require a defendant to be given a proper and adequate opportunity to challenge and question witnesses, it also concluded that it was not incompatible with articles 6(1) and 3(d) for depositions to be read and this can be the case even where there has been no opportunity to question the witnesses at any stage of the proceedings.¹⁶⁹

2.108 Both defendants applied for relief in the European Court of Human Rights. That Court criticised the United Kingdom for failing to respect the rights of both defendants under article 6(3)(d) primarily because the "sole or decisive" evidence against them had been statements from witnesses whom the defendants had not been able to challenge by putting questions to them. The argument of the United Kingdom was that the right conferred by article 6(3)(d) is instrumental, that is, that it exists to ensure that the defendants are not convicted on evidence that is unreliable and there may be in place other safeguards to secure the reliability of the evidence. The European Court of Human Rights held, however, that the right is absolute and cannot be fulfilled by other measures. It noted that an exception to this applied in cases where the defendant is responsible for the witnesses' non-attendance at trial.¹⁷⁰

¹⁶⁷ Section 116(2)(e) and (d) *Criminal Justice Act 2003*.

¹⁶⁸ Spencer "Hearsay Reform: The Train Hits the Buffers at Strasbourg" [2009] *Cambridge Law Journal* 259.

¹⁶⁹ Applications 26766/05 and 22228/06, 20 January 2009 at para. 24.

¹⁷⁰ See *R v Sellick and Sellick* [2005] EWCA Crim 651.

2.109 The complexity of the relationship between the Convention and national law is illustrated by the fact that, at the time of writing (March 2010), the decision of the Court in the *Al-Khawaja* case has been appealed by the UK Government to the Grand Chamber of the Court. Indeed, the Grand Chamber deferred a hearing in the *Al-Khawaja* appeal pending the decision of the UK Supreme Court (which, since 2009, has replaced the UK House of Lords as the UK's final court of appeal) in a similar case, *R v Horncastle and Others*.¹⁷¹

2.110 In the *Horncastle* case, each of the defendants had been convicted on indictment of a serious criminal offence and their appeals had been dismissed by the Court of Appeal. On further appeal to the UK Supreme Court, they argued that they had not received a fair trial, contrary to article 6 of the European Convention on Human Rights. This was based on the argument that their convictions were based primarily on the statement of a witness who was not called to give evidence. In each case the witness was the victim of the alleged offence. Two of the defendants had been convicted of causing grievous bodily harm, with intent, to a Mr Rice. Mr Rice made a witness statement to the police about what had happened to him but had died before the trial (of causes not attributable to the injuries that had been inflicted upon him). His statement was read at the trial and, although there was other evidence that supported it, the Court of Appeal concluded that the statement was "to a decisive degree" the basis upon which these two defendants were convicted. The two other defendants in the *Horncastle* case had been convicted of kidnapping a young woman called Miles. She had made a witness statement to the police in which she described what happened to her. The day before the appellants' trial she ran away because she was too frightened to give evidence. Her statement was read to the jury. A considerable body of oral evidence was also given at the trial of these two defendants. The Court of Appeal held that the convictions of these two defendants did not rest on the evidence of Miles "to a decisive extent".

2.111 Mr Rice's witness statement was admitted pursuant to section 116(1) and (2)(a) of the UK *Criminal Justice Act 2003*, which makes admissible, subject to conditions, the statement of a witness who cannot give evidence because he has died. Miss Miles' witness statement was admitted pursuant to section 116(1) and (2)(e) of the 2003 Act, which makes admissible, subject to conditions, the statement of a witness who is unavailable to give evidence because of fear.

2.112 As Lord Phillips noted in giving the judgment of the UK Supreme Court in the *Horncastle* case, the 2003 Act had been enacted on foot of recommendations made by the English Law Commission in its 1997 *Report on the Hearsay Rule*, which had followed lengthy consultation on the matter. He

¹⁷¹ [2009] UKSC 14 (9 December 2009).

also noted that the 2001 Auld *Review of the Criminal Courts in England and Wales* had considered that the Law Commission's 1997 Report had been too cautious and that more far-reaching reform of the hearsay rule should be enacted, but that the 2003 Act had, in effect, followed the Law Commission's approach to reform. Lord Phillips also pointed out that the 2003 Act had been in force for a number of years and that it was clear from cases on the 2003 Act such as *R v Y*¹⁷² "that the admissibility of hearsay evidence is being cautiously approached by the courts."

2.113 Having reviewed at length the case law of the European Court of Human Rights on Article 6(3)(d), Lord Phillips appeared to suggest that much of it was compatible with the common law accusatorial approach to criminal trials but that the decision in the *Al-Khawaja* case may have failed to appreciate the nuances of the distinctions between civil law and common law trial processes. Using quite diplomatic language, Lord Phillips – and the UK Supreme Court – in effect concluded in the *Horncastle* case that, in such circumstances, the provisions in domestic UK law, the 2003 Act, were to be preferred to the test set out by the European Court of Human Rights in the *Al-Khawaja* case. He stated:¹⁷³

"In these circumstances I have decided that it would not be right for this court to hold that the sole or decisive test should have been applied rather than the provisions of the 2003 Act, interpreted in accordance with their natural meaning. I believe that those provisions strike the right balance between the imperative that a trial must be fair and the interests of victims in particular and society in general that a criminal should not be immune from conviction where a witness, who has given critical evidence in a statement that can be shown to be reliable, dies or cannot be called to give evidence for some other reason. In so concluding I have taken careful account of the [European Court of Human Rights] jurisprudence. I hope that in due course the [European Court of Human Rights] may also take account of the reasons that have led me not to apply the sole or decisive test in this case."

2.114 This passage from the judgment in the *Horncastle* case indicates the sensitivities in the interaction between UK law and the Convention. As is the position under the *European Convention on Human Rights Act 2003* the UK *Human Rights Act 1998* requires the UK courts to "have regard" to the case law of the European Court of Human Rights. While the UK courts – like the Irish courts – are not bound by the decisions of the European Court of Human Rights, the judgment in *Horncastle* clearly indicates that the UK courts would

¹⁷² [2008] 1 WLR 1683.

¹⁷³ [2009] UKSC 14, para 108.

prefer to avoid direct conflict with the European Court of Human Rights; hence Lord Phillips expressed the hope that the lengthy analysis made by the UK Supreme Court of the distinct procedural differences between the common law accusatorial criminal trial process and the inquisitorial process would be given some weight when the Grand Chamber dealt with the *Al-Khawaja* case.

2.115 At the time of writing this Consultation Paper (March 2010), the Grand Chamber decision in the *Al-Khawaja* case is still pending. It is therefore difficult for the Commission to make a definitive conclusion on the interaction between the hearsay rule and Article 6 of the Convention. Nonetheless, it can be said that, in general terms, the case law of the European Court of Human Rights appears to take the position that there is no objection in principle to the admission of hearsay evidence provided that the right of the defence to examine the witnesses against it is safeguarded. This appears consistent with the case law of the Irish courts in connection with the right to fair procedures under Article 40.3 and with the, arguably more stringent, approach taken to the right to confront and cross-examine in the light of the right to a criminal trial in due course of law under Article 38 of the Constitution. The European Court of Human Rights has also suggested that the opportunity for cross-examination at a pre-trial stage may meet the requirements of Article 6 of the Convention. While this may appear to provide a procedural solution in the context of an inquisitorial model of criminal trial, the Commission has previously recommended that pre-trial procedural reforms, using case management principles, can be used in the context of our accusatorial criminal trial process.¹⁷⁴ To that extent (subject to possible reservations concerning the ultimate outcome in the *Al-Khawaja* case), the case law of the European Court of Human Rights appears broadly in line with the approach taken in Irish law.

(4) *Conclusions and provisional recommendations on the right to fair procedures and the hearsay rule*

2.116 Having reviewed the case law on the right to fair procedures under the Constitution of Ireland and the European Convention on Human Rights, the Commission turns to set out its conclusions and provisional recommendations on this.

2.117 It appears clear that the Constitution, in particular the right to fair procedures as identified in the *Haughey* case and subsequent decisions, does not require that hearsay evidence must, as a matter of constitutional law, always be ruled inadmissible. While the courts have not yet made a definitive ruling on this matter, subsequent decisions, such as *Borges v Medical Council*¹⁷⁵ have made clear that, where witnesses are available to testify, even

¹⁷⁴ See *Report on Prosecution Appeals and Pre-Trial Hearings* (LRC 81-2006).

¹⁷⁵ [2004] IESC 9; [2004] 1 IR 103.

where they are not compellable by the adjudicative body, the use of hearsay evidence is unlikely to be allowed. To that extent, it appears that the Constitution of Ireland clearly places limits on any reform which would involve a move towards, for example, a completely inclusionary approach to hearsay. For the Commission, this is not of particular concern because it would be imprudent to suggest such a course, bearing in mind that this could involve third-hand or fourth-hand hearsay, which would then involve decision-making by gossip.

2.118 The more difficult question for the Commission is whether a nuanced approach, involving for example the retention of existing inclusionary exceptions to the hearsay rule in criminal proceedings combined with a generally inclusionary approach in civil proceedings – a model of reform to be found in many other States – could withstand constitutional challenge. The Commission is not, of course, a definitive arbiter of constitutionality, but has some grounds for the view at which it has arrived that such an approach would not be in breach of the Constitution.

2.119 There are two reasons for this. First, Article 40.3.1^o of the Constitution is not written in absolute terms: the State guarantees to protect the personal rights of the citizen “as far as practicable.” This has been interpreted as placing a limit on the extent to which the State is required to protect the rights in question.¹⁷⁶ Secondly, in *Murphy v GM*¹⁷⁷ the Supreme Court indicated – in the context of a challenge to the constitutionality of legislation providing for the confiscation of the proceeds of crime which it characterised as involving civil proceedings – that the admissibility of hearsay evidence in civil proceedings was (in general) permissible, and also implying that stricter limits on its use in criminal proceedings should be expected. Thirdly, in a number of Irish cases which the Commission discusses elsewhere in this Consultation Paper, the courts have drawn attention to the need for specific reform of the hearsay rule, for example, to provide for a business records inclusionary rule along the lines of the provisions contained in the long-standing *Bankers’ Books Evidence Act 1879*.¹⁷⁸ It would be surprising if these suggestions for reform of the hearsay

¹⁷⁶ See generally, Hogan and Whyte, *JM Kelly: The Irish Constitution* (4th ed LexisNexis 2003).

¹⁷⁷ [2001] 4 IR 114.

¹⁷⁸ See *The People (DPP) v Marley* [1985] ILRM 17 and *The People (DPP) v Prunty* [1986] ILRM 716, discussed at paragraphs 5.05ff, below. In the *Prunty* case, the Court of Criminal Appeal referred to the need for specific reform of the hearsay rule to provide for a business records inclusionary rule along the lines of the provisions contained in the long-standing *Bankers’ Books Evidence Act 1879*. This was done in the *Criminal Evidence Act 1992*, which implemented a

rule in an inclusionary direction, made by senior members of the Irish judiciary with wide experience in constitutional litigation, would have been made if the Constitution prohibited such reforms. Of course, the Commission accepts that “a point not argued is a point not decided”¹⁷⁹ and that these judicial suggestions for reform can in no way be seen as definitive. Nonetheless, combined with the other decisions already discussed, the Commission has concluded that the Constitution would not appear to present an insuperable obstacle to suggestions for reform in the direction of an inclusionary approach to hearsay, at least in the context of civil litigation. The Commission acknowledges that, in connection with criminal trials, it is preferable to proceed with caution in terms of hearsay, particularly having regard to the importance attached to the right to cross-examination. The Commission’s main conclusions and recommendations on this are set out below.

2.120 *The Commission provisionally recommends that, as a general principle, the giving of direct evidence that is capable of being tested by cross-examination should be preferred over hearsay.*

2.121 *The Commission considers that the right to fair procedures under the Constitution of Ireland does not prohibit the admissibility of hearsay in all cases and does not, therefore, prevent reform of the hearsay rule towards an inclusionary approach in civil cases.*

2.122 *The Commission acknowledges that the right to cross-examination in criminal trials under the Constitution of Ireland may place particular restrictions on reform of the hearsay rule towards an inclusionary approach in criminal cases.*

recommendation to that effect in the Commission’s 1987 *Report on Receiving Stolen Property* (LRC 23-1987).

¹⁷⁹ See *The State (Quinn) v Ryan* [1965] IR 110, at 120 (Ó Dálaigh CJ).

CHAPTER 3 THE INCLUSIONARY EXCEPTIONS TO THE HEARSAY RULE

A Introduction

3.01 In this Chapter the Commission examines the development of the inclusionary exceptions to the hearsay rule. In Part B, the Commission discusses the emergence of the common law inclusionary exceptions to the hearsay rule, and some criticisms about the absence of any underlying basis for them. The number and scope of these common law exceptions is unclear and it has been said that some were created without full consideration of their implications. In Part C, the Commission examines six inclusionary exceptions to the hearsay rule, most of which were developed judicially in court decisions. In Part D, the Commission discusses whether, assuming further statutory reform of the rule, there should be a continued role for judicial development of the rule, in particular the inclusionary exceptions. In some States, judicial decisions have expanded existing inclusionary exceptions and even the creation of entirely new ones. Irish courts have, in general, indicated a reluctance to engage in any significant reform and have tended to suggest this is a matter for statutory development.¹

B Overview of the Inclusionary Exceptions to the Hearsay Rule

3.02 In this Part, the Commission provides a general overview of the development of the inclusionary exceptions to the hearsay rule. This includes a listing of the most commonly-discussed inclusionary exceptions, a general

¹ In *The People (DPP) v Marley* [1985] ILRM 17 and *The People (DPP) v Prunty* [1986] ILRM 716, discussed at paragraphs 5.05ff, below, the Court of Criminal Appeal indicated that further reform of the hearsay rule was primarily a matter for the Oireachtas. In the *Marley* case, the Court referred to the proposals for reform made by the Commission in its 1980 *Working Paper on the Rule Against Hearsay* (LRC WP 9-1980). In the *Prunty* case, the preference of the Court for legislative reform was followed by a recommendation for reform concerning the admissibility of business records in the Commission's 1987 *Report on Receiving Stolen Property* (LRC 23-1987), which was implemented in the *Criminal Evidence Act 1992*.

review of suggestions to reform that have been made in other States, and a discussion of some forensic techniques that have been used (and criticised) for avoiding the hearsay rule.

(1) The main inclusionary exceptions

3.03 The Commission has already noted in Chapter 1 that, as the hearsay rule developed, the disadvantages emanating from its strictness became apparent. The rule in its purest form excluded evidence of a dead, unavailable or unidentifiable person even where it was agreed that such evidence was reliable.

3.04 Ultimately, as discussed in detail in Part C below, a number of inclusionary exceptions to the hearsay rule were developed. These include the following: admissions and confessions; spontaneous statements connected with the subject matter of the case (the *res gestae* rule); dying declarations (admissible only in a murder and manslaughter case); certain statements of persons since deceased (including statements by testators concerning the contents of their wills); public documents; and certain statements made in previous proceedings. It has been noted that, in some respect, the range of these inclusionary exceptions have made them almost more important than the hearsay rule itself.²

3.05 The numerous exceptions to the hearsay rule are unsatisfactory in several respects. In many instances it is difficult to see why they apply to the extent that they do, but no further, as in the case of the dying declarations exception (which, at common law, applies only in criminal prosecutions for murder and manslaughter). Indeed, it appears that many of the exceptions came into being as the need arose when the hearsay rule itself proved inconvenient in a particular case. As Lord Reid observed in the UK House of Lords decision *Myers v DPP*³ “[i]t was relaxed just sufficiently far to meet that case, and without regard to any question of principle.”⁴

3.06 Writing in the context of US law, it has been suggested that since anywhere from 27 to 100 specific inclusionary exceptions may exist, “another way to state the law is to assert that unreliable hearsay is not admitted”.⁵ It has also been argued that, because of its many exceptions and evolving policies,

² Fennell *The Law of Evidence in Ireland* (2nd edition Butterworths, 2003)

³ [1965] AC 1001

⁴ *Ibid* at 1020.

⁵ Reed “Evidentiary Failures: A Structural Theory of Evidence Applied to Hearsay Issues” (1994) 18 *American Journal of Trial Advocacy* 353, at 371.

the concept of a strict “rule against hearsay” is probably not strictly accurate so that the term “hearsay rule” is more accurate.⁶

(2) Suggested approach based on exclusion of reliable evidence.

3.07 As already noted, there is judicial acceptance that the rigidity of the hearsay rule has the potential to produce injustice in individual cases because of the exclusion of probative evidence.⁷ Clearly, the reluctance to admit hearsay is based on the dangers associated with hearsay evidence in general.⁸ These include the risk of distortion inherent in evidence which consists of repeating a statement uttered by someone else, fears that juries may place misguided reliance on hearsay evidence and the risks associated with an absence of cross-examination. Nonetheless, it has been conceded that the boundaries of the hearsay rule are confusing, including that there is little agreement on the exact number of the inclusionary exceptions.

3.08 In this respect, it has been recognised that not all hearsay is susceptible to the risks associated with distortion, jury confusion and the lack of cross examination. The risk is minimised in the case of written hearsay and the Oireachtas, in enacting the business documents inclusionary exception in Part II of the *Criminal Evidence Act 1992*, has taken this into account.⁹ The 1992 Act reflects the need to take account of technological developments, and ensure that reliable and largely uncontroversial evidence being is not excluded from a case. The 1992 Act ensured that the outcome in the UK House of Lords in *Myers v DPP*,¹⁰ which has being described as “perhaps the most obstructive

⁶ Kadish and Davis “Defending the Hearsay Rule” (1989) 8:3 *Law and Philosophy* 333, at 334 (Symposium on Legitimacy of Law).

⁷ See the discussion of the constitutional dimension to the rule at paragraph 2.67ff, above, including the decision of the Supreme Court in *Borges v Medical Council* [2004] IESC 9; [2004] 1 IR 103.

⁸ Murphy “Hearsay: the road to reform” (1996) 1 *Evidence and Proof* 107,117.

⁹ The 1992 Act, discussed in detail at paragraphs 5.04ff, below, implemented the recommendations to that effect in the Commission’s *Report on Receiving Stolen Property* (LRC 23-1987), paragraphs 29 (discussion of the law) and 144 (recommendation for reform).

¹⁰ [1965] AC 1001.

decision in the field of hearsay,¹¹ was avoided (assuming that the decision in *Myers* would have been followed).¹²

3.09 Of course, all the judges in the UK *Myers*¹³ case acknowledged that a policy of “make do and mend” by the courts was no longer an option, and as this Consultation Paper makes clear wide-ranging reform of the hearsay rule has been enacted by virtually every common law country in the intervening 50 years since the *Myers* decision (in addition to the partial statutory reforms that had been enacted from the 19th century onwards). For example, in 1997 the Law Commission for England and Wales examined options for legislative reform in its *Report on Evidence in Criminal Proceedings - Hearsay and Related Topics*.¹⁴ The Law Commission’s draft Evidence Bill appended to the 1997 Report proposed automatic categories of admissibility and a limited residual discretion to admit reliable hearsay that did not fit into any of the fixed exceptions. The UK *Criminal Justice Act 2003* adopted this category-based approach rather than the suggestion in the Auld Report¹⁵ that “hearsay should generally be admissible subject to the principle of best evidence”.¹⁶

3.10 As discussed in more detail below in Part D, the prevailing approach of the Canadian courts is not to follow the approach in the UK *Myers* case, but rather to allow the development of new inclusionary exceptions based on a dual reliability and necessity test.

3.11 The United States Supreme Court favours a test of whether the evidence appears to be reliable. Murphy notes that originally the Court sought to protect the interests of the accused by requiring that before hearsay evidence can be admitted the prosecution must have shown that the declarant witness was unavailable.¹⁷ In *Ohio v Roberts*¹⁸ the United States Supreme Court stated

¹¹ Ashworth and Pattenden, "Reliability, Hearsay Evidence and the English Criminal Trial" (1986) 102 LQR 292 at 293.

¹² The Commission has already noted that doubts had been expressed as to whether the approach taken in *Myers* would have been followed in Ireland: see the Introduction, paragraph 8, above.

¹³ [1965] AC 1001, at 1007 (Lord Reid).

¹⁴ Law Commission for England and Wales *Evidence in Criminal Proceedings-Hearsay and Related Topics* (1997) LC 245.

¹⁵ *Auld Review of the Criminal Courts of England and Wales Report* (2001).

¹⁶ *Ibid* at paragraphs 11.97-11.104.

¹⁷ Murphy "Hearsay: the road to reform" (1996) 1 *Evidence and Proof* 107,124. The Court addressed the meaning of “unavailable” in *Barber v Page* 390 US 719 (1968) and held that the prosecution must demonstrate unavailability.

that the prosecution must demonstrate unavailability and an adequate “indicia of reliability”. Among the possible indicia of reliability is that the statement is corroborated by independent evidence from another source and the apparent absence of any motive to fabricate, exaggerate or conceal the facts.

3.12 In South Africa, the South African Law Commission’s 1986 *Review of Evidence*¹⁹ rejected the categorisation approach of the English common law as it relates to the hearsay rule and introduced a more principled approach. In its Discussion Paper on *Evidence and Hearsay* in 2008 it said that there was no reason to depart from this principled approach.

3.13 A possible argument can be made that wide-ranging admission of hearsay, subject to safeguards for relevance or the weight of evidence, could ensure that all reliable evidence was brought before the court and that inefficiencies arising from determining the admissibility of hearsay would be eliminated. In the Commission’s view, however, any such approach is unlikely to withstand challenge by reference to the right to fair procedures in Article 40.3 of the Constitution, and the comparable principles in the European Convention on Human Rights, which the Commission has already discussed in Chapter 2.²⁰ From a purely practical point of view, the Commission would also be concerned that a wide-ranging expansion of the inclusionary exceptions or creating a new overarching exception could lead to numerous court challenges, in particular in criminal proceedings, and the risk that low quality evidence might be admitted.

3.14 An alternative approach which would minimise the difficulties associated with excluding reliable evidence but would retain protection afforded by the rule is to have a separate approach to hearsay in civil and criminal cases, with the rule being tailored by legislation to the requirements of both proceedings. For the reasons already outlined in this respect in Chapter 2 in connection with the analysis of the right to fair procedures the Commission has taken the view that this differentiated approach to reform appears to be the most appropriate to take.

(3) Forensic techniques used to avoid the Hearsay Rule

3.15 Related to the absence of a clear foundation for the development of the hearsay rule, and the inclusionary exceptions, it appears that, in England at least, practising lawyers have resorted to certain forensic techniques designed to avoid the rule.²¹ One such technique involves avoiding direct questions on

¹⁸ 448 US 56 (1980).

¹⁹ South Africa Law Commission Report, Project 6 *Review of Evidence* (1986).

²⁰ See paragraph 2.32ff, above

²¹ Keane *The Modern Law of Evidence* (5th ed Butterworths 2000) at 263.

the contents of a statement but instead asking a witness a sequence of questions from which the jury can infer what was in the statement. McGrath²² notes that Lord Devlin spoke disapprovingly of such practices in the course of his judgment in the UK House of Lords decision *Gliniski v McIver*²³ :

“The first consists in not asking what was said in a conversation or written in a document but in asking what the conversation or document was about; it is apparently thought that what would be objectionable if fully exposed is permissible if decently veiled... The other device is to ask by means of ‘Yes’ or ‘No’ questions what was done. (Just answer ‘Yes’ or ‘No’: Did you go to see counsel? Do not tell us what he said but as a result of it did you do something? What did you do?) This device is commonly defended on the ground that counsel is asking only about what was done and not about what was said. But in truth what was done is relevant only because from it there can be inferred something about what was said. Such evidence seems to me to be clearly objectionable. If there is nothing in it, it is irrelevant; if there is something in it, what there is in it is inadmissible.²⁴

3.16 The Commission considers that, regardless of whether such techniques have been used in Ireland, it seems preferable to approach the hearsay rules from the point of view of making suitable proposals for reform which would then provide a clear statutory framework on which the admissibility of evidence can be based. Bearing these general comments in mind, the Commission turns to examine a number of the most significant common law and statutory inclusionary exceptions.

C Inclusionary Exceptions to the Hearsay Rule

3.17 In this Part, the Commission discusses the following six inclusionary exceptions to the hearsay rule: admissions and confessions; spontaneous statements connected with the subject matter of the case (the *res gestae* rule); dying declarations (admissible only in a murder and manslaughter case); certain statements of persons since deceased (including statements by testators concerning the contents of their wills); public documents; and certain statements made in previous proceedings. The Commission concludes this Part by considering whether a general “inherent reliability” test, which has emerged

²² McGrath *Evidence* (Thompson Roundhall 2005) paragraph 5-32.

²³ [1962] AC 726.

²⁴ *Ibid* at 780-781. See also *R v Turner* (1975) 60 Cr App R 80, 83.

in Australia as a basis for new inclusionary exceptions, would be a suitable basis for reform of the law.

(1) Admissions and confessions

3.18 One the most important, and oldest, exceptions to the hearsay rule concerns admissions and confessions. In a strict sense, the words “admission” and “confession” are slightly different in meaning but the law relating to their admissibility is the same. In civil cases, an admission is a statement given in evidence that is in conflict with one party’s claim; in criminal cases, an admission is usually contrary to the accused’s interests and may be sufficient to convict. In civil proceedings, admissions (or statements against interest as they are sometimes called) are generally more widely regarded as admissible, bearing in mind that they may have been generated in a neutral setting. By contrast, in a criminal trial an admission or confession was traditionally regarded with unease because it often arose during police interrogation, and the law therefore developed many specific rules (at first common law, and later statutory) unrelated to the hearsay rule, concerning the admissibility of admissions and confessions.²⁵

3.19 The Commission does not propose in this Consultation Paper to explore the rules concerning the admissibility of confessions in criminal cases that do not concern the hearsay rule. It is sufficient to note for present purposes that, assuming compliance with these admissibility rules, the rationale for allowing the admission of a self-incriminating statement, in terms of being an inclusionary exception to the hearsay rule, was that “it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true”.²⁶

(2) Spontaneous statements connected with the subject matter of the case (the *res gestae* rule)

3.20 The phrase *res gestae* (literally, “things done”) refers to the inclusionary exception by which a party is allowed to admit evidence which consists of, among other things, everything that is said and done in the course

²⁵ The courts developed rules of admissibility such as that the admission must be voluntary and not the product of threats or inducements, and these were supplemented by administrative rules known as the Judges’ Rules. These common law rules have largely been replaced by constitutional and statutory provisions, including the use of electronic recordings of Garda interviews and interrogations. See generally Walsh *Criminal Procedure* (Thomson Round Hall, 2002) and O’Malley *The Criminal Process* (Round Hall, 2009).

²⁶ Grose J in *R v Lambe* (1791) 2 Leach 552, at 555.

of an incident or transaction that is the subject of a civil or criminal trial. The *res gestae* exception is based on the view that, because certain statements are made spontaneously in the course of an event, they carry a high degree of credibility.

3.21 In Ireland, the Court of Criminal Appeal considered in detail the *res gestae* in *The People (Attorney General) v Crosbie and Meehan*²⁷ and *The People (DPP) v Lonergan*.²⁸ In the *Crosbie* case, the defendants were convicted of manslaughter. The victim, who had been stabbed, stated within a minute of being stabbed – and when the first defendant was standing near him: “he has a knife, he stabbed me”. On appeal, the Court of Criminal Appeal held that the words spoken by the victim were admissible, although it was hearsay, because it formed part of the criminal act for which the accused was tried. The Court stated that:²⁹

“evidence of the statement made by [the victim] immediately after he had been stabbed by [the defendant] was admissible in evidence against all the accused, although it was hearsay, because it formed part of the criminal act for which the accused were being tried or for those who prefer to use Latin phrases, because it formed part of the *res gestae*.”

3.22 The Court in *Crosbie* approved the following comments made on the *res gestae* by Lord Normand in the UK Privy Council case *Teper v R*³⁰:

“The rule against the admission of hearsay evidence is fundamental... Nevertheless, the rule admits of certain carefully safeguarded and limited exceptions, one of which is that words may be proved when they form part of the *res gestae*... It appears to rest ultimately on two propositions, that human utterance is both a fact and a means of communication, and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words, and the dissociation of the words from the action would impede the discovery of truth. But the judicial applications of these two propositions, which do not always combine harmoniously, have never been precisely formulated in a general principle. Their Lordships will not attempt to arrive at a general formula, nor is it necessary to review all of the considerable

²⁷ [1966] IR 490.

²⁸ [2009] IECCA 52.

²⁹ [1966] IR 490, at 496.

³⁰ [1952] AC 480, at 486-487 (Lord Normand).

number of cases cited in the argument. This, at least, may be said, that it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement.”

3.23 In *Crosbie* the Court of Criminal Appeal concluded:³¹

“The words spoken by [the victim] were spoken within one minute of the stabbing. They related directly to the incident which was being investigated (the stabbing), and they were spoken immediately after it. If the words of Lord Normand [in *Teper v R*] are adopted, the words were so clearly associated with the stabbing in time, place and circumstances that they were part of the thing being done and so an item or part of real evidence and not merely a reported statement.”

3.24 In *The People (DPP) v Lonergan*,³² the Court of Criminal Appeal again considered the *res gestae*. The defendant had been convicted of murdering his brother, who had died as a result of stabbing. At his trial, evidence was given by witnesses as to statements made by the victim 10 or 15 minutes after the stabbing, which were admitted in evidence on the basis that they formed part of the *res gestae* and as evidence of the truth of their contents. One of the witnesses stated that the victim had said to her: “the bastard stabbed me, my own brother stabbed me”. Another witness stated that the victim said: “he is after stabbing me, Albie [the defendant’s first name] is after stabbing me”. On appeal, the defendant argued that these statements had been improperly admitted into evidence. He argued that only statements that had been made contemporaneously with the stabbing should have been admitted into evidence and that the statements in question were not and thus did not form part of the *res gestae*. The prosecution argued that all of the statements made by the victim, who clearly identified the defendant as the assailant, were admissible as forming part of the *res gestae* including the statements he made up to 15 minutes after the stabbing incident.

3.25 In *Lonergan*, the Court of Criminal Appeal quoted with approval the following summary of the *res gestae* by McGrath:³³

“Statements concerning an event in issue, made in circumstances of such spontaneity or involvement in an event that the possibility of

³¹ [1966] IR 490, at 497-8.

³² [2009] IECCA 52.

³³ McGrath, *Evidence* (Thomson Roundhall, 2005), at paragraph 5-53.

concoction, distortion or error can be disregarded, are admissible as evidence of the truth of their contents. The rationale for the admission of this category of out of court statements is evident from the formulation of the exception – they are made in circumstances where the declarant’s mind is so dominated by a startling or overwhelming event that the statement is a spontaneous and instinctive reaction, made without any opportunity for the declarant to devise a false statement.”

3.26 The Court in *Lonergan* also approved the approach to the *res gestae* taken in the UK Privy Council case *R v Ratten*,³⁴ in which Lord Wilberforce stated:

“The test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it.”³⁵

3.27 The Court in *Lonergan* also noted that this view had later been endorsed by the UK House of Lords in *R v Andrews*,³⁶ in which Lord Ackner had engaged in a significant re-formulation of the relevant principles:³⁷

“1. The primary question which the judge must ask himself is - can the possibility of concoction or distortion be disregarded?

2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his

³⁴ [1972] AC 378.

³⁵ *Ibid* at 389.

³⁶ [1987] AC 281.

³⁷ *Ibid.*, at 300-301.

utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

3. In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event...

4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied upon evidence to support the contention that the deceased had a motive of his own to fabricate or concoct, namely... malice...

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error... In such circumstances the trial judge must consider whether he can exclude the possibility of error."

3.28 In *Lonergan*, it had been argued that the trial judge had deviated from the approach taken in the *Crosbie* case, above, because he had taken the "composite approach" identified in the UK *Ratten* and *Andrews* decisions. Significantly, the Court of Criminal Appeal in *Lonergan* considered that there was no conflict involved. In an important passage on this, the Court stated:³⁸

"[T]his Court does not see the decision in *Crosbie* as being in conflict with the decision of the Privy Council in *Ratten v R* or the decision of the House of Lords in *R v Andrews* albeit that those decisions carry the reasoning in *Crosbie* somewhat further. The Court is satisfied that the more evolved formulation of principle set out by Lord Ackner [in *R v Andrews*] does no more than elaborate the rationale for the views expressed in *Crosbie*. The composite approach adopted by the trial judge, which gave due weight to both the requirement of contemporaneity and the possibility of concoction or fabrication, appear to this Court to represent the correct approach to this issue. It would be quite wrong to hold that admissibility should be determined by reference

³⁸

[2009] IECCA 52.

solely to a given time period as to do so would lead to arbitrary and unfair results. Time in this context is an important factor but not a determinant. The true importance of the requirement of contemporaneity is to eliminate the possibility of concoction. Where it is clear that no such opportunity existed on the facts of a given case it would be quite wrong to exclude statements on some arbitrary time basis. It is more a matter of factoring in both components when deciding whether or not to admit such statements as part of the *res gestae*. In every case the trial judge will have to exercise his discretion having regard to the particular circumstances of the case.”

3.29 Applying this approach in *Lonergan* the Court of Criminal Appeal noted that there was no suggestion that there was an alternative set of events other than those described by the witnesses. Neither was it suggested that there was another possible perpetrator. The Court was, therefore, “entirely satisfied” that the statements made 10 minutes after the stabbing were correctly admitted. In this respect, the Court concluded that: they formed part of the same transaction; they were sufficiently contemporaneous; the Court was satisfied that there was no opportunity on the part of the victim to concoct or fabricate an explanation, and that no motive for his having done so was ever identified; and they were sufficiently contemporaneous to be admissible as evidence.

3.30 As has been noted,³⁹ it is clear that the decision in the *Lonergan* has adopted the composite approach to the *res gestae* taken by the UK House of Lords in *R v Andrews*,⁴⁰ and that all the circumstances identified by Lord Ackner ought to be considered.

3.31 Despite its long-established position in the law of evidence, the *res gestae* inclusionary exception has attracted some criticism. In the English case *Holmes v Newman*,⁴¹ the phrase *res gestae* was criticised because it provides “a respectable legal cloak for a variety of cases to which no formulae of precision can be applied.” Likewise, in *R v Ratten*⁴² it was said that the expression *res gestae* is often used to cover situations that have been insufficiently analysed. Cowen and Carter are more vehement in their critique of the exception stating that “often refuge is sought in the dustbin of *res gestae*”.⁴³

³⁹ Byrne, “Evidence and Procedure Update” (2009) 19 (3) *Irish Criminal Law Journal* 89.

⁴⁰ [1987] AC 281.

⁴¹ [1931] 2 Ch 112.

⁴² [1972] AC 378.

⁴³ Cowen and Carter *Essays on the Law of Evidence* (1956) 4.

Similarly disparaging comments were made by the Court of Criminal Appeal in *The People (DPP) v O'Callaghan*⁴⁴ although this was prior to the detailed analysis in the *Lonergan* case, discussed above. In England, the Law Commission contemplated the abolition of the *res gestae* exception as it considered the case law on the scope of it to be convoluted and lacking in any clear principles.⁴⁵ Ultimately, it recommended that the composite test set out by the UK House of Lords in *R v Andrews*⁴⁶ - which the Court of Criminal Appeal approved in the *Lonergan* case - should be retained in statutory form in criminal cases. Bearing in mind that English law in civil cases (under the *Civil Evidence Act 1995*) has effectively moved towards an inclusionary hearsay rule, it is notable that, following the Law Commission's approach the *res gestae* exception has, for criminal cases, been placed on a statutory footing in section 118 of *Criminal Justice Act 2003*, and this statutory version reflects the approach taken in *R v Andrews*.

3.32 The Commission notes that, in the United States, Rule 803(2) of the *Federal Rules of Evidence* has, in effect, subsumed the *res gestae* rule within the ambit of "excited utterances" whereby statements are admitted if they relate to a startling event or condition and are made while the declarant is under stress or excitement arising from that event or condition. The *res gestae* doctrine in the United States has, therefore, evolved into a number of specific inclusionary exceptions some of which bear only a distant resemblance to the original *res gestae* concept.⁴⁷

(3) Dying Declarations

3.33 A dying declaration, made with the knowledge of the imminence of death, is another important inclusionary exception because it may be admitted to prove the circumstances in which the death occurred. Traditionally, the dying declaration inclusionary exception has never been applied to civil claims; and, in criminal proceedings, it only applies to charges of murder and manslaughter. In the English case *R v Woodcock*,⁴⁸ the defendant had been charged with

⁴⁴ [2001] 1 IR 584, at 588.

⁴⁵ Consultation Paper on *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Com CP No 138, 1996) paragraph 3.49.

⁴⁶ [1987] AC 281.

⁴⁷ Davidson "Res Gestae in the Law of Evidence" [2007] 11 Edin LR 379 at 386. Davidson refers to *Iowa v. Stafford* (1946) 23 NW 2d 832, where a statement made 14 hours after the event was admitted under the excited utterance doctrine, and *Ohio v Stipek* (1995) 73 Ohio St 3d 1425, where a statement made 6 weeks following the event was not.

⁴⁸ (1789) 168 ER 352.

murder. The victim had been badly beaten and, two days prior to her death, which occurred from the beating, she told a magistrate that her husband, the defendant, was the perpetrator. The trial court, faced with the difficulty that hearsay was available but the witness was not, surmounted this by developing the dying declaration exception to the hearsay rule. The Court stated:

“[T]he general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is created by a positive oath administered in a Court of Justice”.⁴⁹

3.34 As is evident from this passage in *R v. Woodcock*, when the dying declaration inclusionary exception was developed, the belief was that these statements were, by their very nature, trustworthy since persons were beyond the hope of recovery and were in fear of eternal punishment if they lied. In *R v Osman*,⁵⁰ it was held that the exception’s trustworthiness requirement was satisfied because no person “who is immediately going into the presence of his Maker will do so with a lie upon his lips”.⁵¹ Thus the law of dying declarations is based on the view that the imminence of death is a substitute for the oath. In the early 21st century, this religious foundation may have lost some of its influence although the premise that psychological pressure might keep a declarant from lying remains applicable.

3.35 Rose notes that while religion and spontaneity have traditionally provided the foundations for the dying declaration exception the fundamental rationale for admitting the evidence is to have a fair hearing when a key witness is dead.⁵² Reliance on the artificial construct of “settled hopeless expectation of death” for admitting a dying declaration has formed a basis of criticism of this exception to the hearsay rule. It has also been argued that the restriction of the rule to murder and manslaughter is arbitrary and indefensible. For example if a person is evidently dying as a result of his or her throat being slit it cannot be assumed that the person knew that they were dying. As Glanville Williams

⁴⁹ *Ibid* at 353.

⁵⁰ (1881) 15 Cox CC 1.

⁵¹ *Ibid*.

⁵² Rose “Can a Suicide Victim be taken at her word?: The Louisiana Supreme Court Declares a Suicide Note Inadmissible Hearsay in *Garza v Delta Tau Delta Fraternity National*” 81 *Tulane Law Review* (2006-2007).

pointed out, the presumption is that “hope springs eternal” so that however desperate a person’s condition evidently is, the statement may only be admitted as a dying declaration if there are words expressed or other deeds to show that the person had a “settled hopeless expectation of death”.⁵³

3.36 The fear that the dying person would manufacture evidence against his or her enemy and then precipitate his or her own death in an act of revenge is a remote and fanciful concern. Glanville Williams also stated that there is no need to confine the exception to declarations made while dying and it ought to be extended to declarations of all deceased persons and to those people who are unable for any other reason to give evidence.⁵⁴ This would, however, be a major extension of the rule and could include statements by vulnerable or intimidated witnesses in a trial whose evidence would otherwise fall squarely within the exclusionary hearsay rule.

3.37 The English common law approach to dying declarations has largely been followed in the United States. In 1973, the Report of the House of Representatives Committee on the Federal Rules of Evidence⁵⁵ did not recommend its expansion to all criminal and civil cases because the Committee did not consider dying declarations as among the most reliable forms of hearsay. Consequently, it amended the relevant provision in the Federal Rules of Evidence to limit their admissibility in criminal cases to homicide prosecutions, where exceptional need for the evidence is present. In 1975 the concept of dying declarations was codified in Rule 804(b)(2) of the *Federal Rules of Evidence*.⁵⁶ In addition to applying it in the traditional setting of homicide, Rule 804(b)(2) extended the dying declaration exception to civil cases. Jarreau states:

“Still relying on the English and common law rules, courts held that Rule 804(b)(2) provided for an exception to the hearsay rule because the circumstances of belief of impending death seem to obviate any

⁵³ Williams *The Proof of Guilt: A Study of the English Criminal Trial* (3rd edition Stevens and Sons, 1963) 200.

⁵⁴ *Ibid.*, at 203.

⁵⁵ *Report of House Committee on the Judiciary (Federal Rules of Evidence)*, H.R. Rep. No.650, 93d Cong., 1st Sess. (1973), at 15.

⁵⁶ Rule 804(b)(2) of the *Federal Rules of Evidence* provides that, among the inclusionary hearsay exceptions, are statements under the belief of impending death. Rule 804(b)(2) states the following is admissible: “In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.”

motive on the part of the declarant to misstate the truth. More realistically, the dying declaration is admitted, because of compelling need for the statement rather than any inherent trustworthiness”.⁵⁷

3.38 *Garza v Delta Tau Delta Fraternity National*⁵⁸ illustrates the limits of the rule, even as extended. In *Garza* the Supreme Court of Louisiana held that a suicide note did not fall within the “statement under belief of impending death” exception.

(4) Certain statements of persons now deceased

3.39 The common law also relaxed the hearsay rule for certain prior statements of persons who had died by the time civil or criminal proceedings came to trial. There is no general test for admitting the hearsay statements of persons now deceased. Instead exceptions developed on an *ad hoc* basis and were confined to specific situations. These are:

- Declarations by deceased persons against a pecuniary or proprietary interest,
- Written declarations by the deceased in the course of duty,
- Declarations by a deceased person relating to pedigree (in effect, blood relationships),
- Declarations by a deceased person explaining the contents of his or her will.

Healy comments that these specific instances have not arisen for judicial consideration in Ireland in recent times and that, in any event, courts prefer, where possible, to assess such statements as *res gestae* or original evidence.⁵⁹

(5) Public documents

3.40 During the 19th century, the English courts recognised that most public documents should be held admissible as evidence of the truth of their contents, thus constituting another extremely important exception to the hearsay rule. This exception is clearly based on both reliability and convenience. One of the leading English cases on this is the UK House of Lords decision *Sturla v Freccia*⁶⁰ in which the exception was described as applying to

⁵⁷ Jarreau “Dying declarations in an ever-changing world: a peek into the implications of expansion” *Defense Counsel Journal* (October 2006) Vol. 73 (4) 352.

⁵⁸ So. 2d 1019.

⁵⁹ Healy *Irish Laws of Evidence* (Thomson Round Hall 2004) paragraph 9-78.

⁶⁰ (1880) 5 App Cas 623.

a document that is made by a public officer for the purpose of the public making use of it and being able to refer to it. In the case itself, it was decided that the document in question (a confidential report of a committee appointed by a public authority in Italy to decide the fitness of a person for public office in that country) was not a public document. The following passage from the judgment of Lord Blackburn has often been cited with approval:

“I do not think that ‘public’ there is to be taken in the sense of meaning the whole world... an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be “public” within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it.”⁶¹

3.41 Typical examples therefore include certificates of birth, marriages and death and ordnance survey maps. It is likely that the public official who made the original entries in question may be dead, unavailable or unable to remember the facts recorded in a later court hearing, so it is clear that the rule was developed primarily on the basis of convenience. Equally, such documents can be presumed reliable, but of course it remains possible for parties to challenge the facts contained in them.⁶²

3.42 The Commission notes that, in addition to this judicially-developed inclusionary exception, many comparable statutory provisions were enacted in the 19th century and 20th century to make public documents admissible. Thus, a number of *Evidence Acts*, including the *Evidence Act 1851* and the *Documentary Evidence Act 1925*, were enacted to provide that certain public documents are admissible. The Commission has considered these Acts in detail in its *Consultation Paper on Documentary and Electronic Evidence*.⁶³ These Acts complement the approach now taken to certain “private” documentary business records in, for example, Part II of the *Criminal Evidence Act 1992*.⁶⁴

(6) Testimony in Former Proceedings

3.43 A statement made by a person while giving evidence, whether orally or by affidavit, is admissible in subsequent proceedings, between the same parties concerning the same (or substantially same) subject matter if the

⁶¹ *Ibid* at 643.

⁶² See Healy *Irish Laws of Evidence* (Thomson Round Hall 2004) paragraph 9-85.

⁶³ LRC CP 57-2009.

⁶⁴ See paragraphs 5.04 - 5.12, below.

witness is unavailable to give evidence. This constitutes an exception to the hearsay rule because the circumstances in which the statement was made address the concerns underlying the hearsay rule – the statement was made under oath and the party against whom the statement was made had an opportunity to cross-examine the witness. The requirement of unavailability is met if the witness is dead, is too ill to attend court, has been prevented from attending by the party against whom the evidence is to be admitted, is outside of the jurisdiction or cannot be located following intensive enquires. This exception was not expressly considered by the Supreme Court in *Borges v Medical Council*⁶⁵ but the decision indicates that it does not apply where the witness is unavailable simply because he or she is unwilling to testify.

(7) Inclusionary exceptions based on the reliability of the hearsay

3.44 In some countries, the courts have replaced the approach followed in Ireland (and, at common law, in the UK), that is, the development of limited exceptions on a case-by-case basis, with a more general approach which takes an inclusionary approach based on the reliability of the evidence.

3.45 An “inherent reliability” exception has, for example, emerged in Australia based on extending the spontaneity test used in the UK Privy Council in *R v Ratten*⁶⁶ for the *res gestae*, thus applying this to all evidence, whether part of the “transaction” or not.⁶⁷ The exception was first developed by Mason CJ in *Walton v R*⁶⁸ and appeared to aim to strike a balance between the stance taken by the UK House of Lords in the *Myers* case, that any reform of the hearsay rule would need to come from the legislature, and the flexible approach taken by, for example, the Supreme Court of Canada in *R v Khan*.⁶⁹ Collins has stated:

“The exception is formulated as a discretion rather than a criterion-based categorical exception. It is expressed in terms of weighing up the competing factors of reliability (such as spontaneity, non-

⁶⁵ [2004] IESC 9; [2004] 1 IR 103.

⁶⁶ [1972] AC 378.

⁶⁷ Collins “New Exceptions or Principled Determinations: The Unreliable Response of the Australian High Court to the Reform of the Hearsay Rule” (2003) 10 (4) *Murdoch University Electronic Journal of Law* available at <http://www.murdoch.edu.au/elaw/issues/v10n4/collins104.html>.

⁶⁸ (1989) 166 CLR 283.

⁶⁹ [1990] 2 SCR 531.

concoction) against various dangers (such as the lack of cross examination, motive for fabrication). The legal significance of the exception's characterisation as a discretion is that it would be much more difficult for appellate courts to overturn a decision regarding an issue of admissibility.⁷⁰

3.46 In *Pollitt v R*⁷¹ the Court returned to the issue but there was no clear agreement as to whether this flexible approach to the hearsay rule should be adopted. While there was some support for Mason CJ's approach, McHugh J supported it only insofar as it was limited to admit evidence where there appeared to be a high degree of reliability. By contrast, Brennan J explicitly rejected a flexible approach to the hearsay rule and restated this position in *Bannon v R*⁷² where he criticised the reliability exception on the grounds that it is not based on any specific criteria. In addition McHugh J, despite indicating support for the inherent reliability exception in *Pollitt*, expressed reluctance in *Bannon* to support any new changes to the hearsay rule. Following the decision of *Papakosmas v R*⁷³ it is apparent that the reliability exception has lost favour with the Court, even as a broad guiding principle and in that case both Kirby and Gaudron JJ noted that no new common law exceptions to the hearsay rule had been developed since *Myers v DPP*.

3.47 Following a review of the law by the Australian Law Reform Commission, the *Evidence Act 1995* now provides for circumstances in which the hearsay rule does not apply, with prescribed conditions that are intended to promote reliability. However, Collins argues that the fact that the 1995 Act only applies to federal and territorial courts has contributed to judicial ambiguity regarding hearsay reforms.⁷⁴ In 2004, the Australian Law Reform Commission began a review of the operation of the 1995 Act. In that review a concern was raised whether the threshold reliability of a hearsay statement should continue to be assessed with regard only to the circumstances in which the statement

⁷⁰ Collins "New Exceptions or Principled Determinations: The Unreliable Response of the Australian High Court to the Reform of the Hearsay Rule" (2003) 10 (4) *Murdoch University Electronic Journal of Law* available at <http://www.murdoch.edu.au/elaw/issues/v10n4/collins104.html>.

⁷¹ (1992) 174 CLR 558.

⁷² (1995) 70 ALR 25

⁷³ (1999) 164 ALR 548.

⁷⁴ Collins "New Exceptions or Principled Determinations: The Unreliable Response of the Australian High Court to the Reform of the Hearsay Rule" (2003) 10 (4) *Murdoch University Electronic Journal of Law* available at <http://www.murdoch.edu.au/elaw/issues/v10n4/collins104.html>.

was made, or whether the 1995 Act should be amended so that other evidence could be considered in evaluating the threshold reliability of a statement. The Australian Law Reform Commission declined to propose such an amendment on the ground that an enquiry into broader circumstances “is likely to require the trial judge to consider the whole of the prosecution case and determine guilt before admitting the representation as reliable. This would sit uncomfortably with safeguards designed to afford the defendant a fair trial”.⁷⁵

3.48 The Supreme Court of Canada, in *R v. Khan*⁷⁶ decided that hearsay should be admissible on the basis of two key governing principles, reliability and necessity. In *Khan* the Court held that evidence of what a 4 year old girl said to her mother about a sexual assault on her should have been admitted because in the specific circumstances the evidence was reasonably necessary and reliable. In *R v Smith*⁷⁷ the Supreme Court in Canada made it clear that the approach in *R v. Khan* should not be restricted to child abuse cases. Favouring the Wigmore approach for all hearsay cases, in *Smith* the court stated that the decision in *Khan* should be understood as the triumph of a principled analysis over a set of ossified judicially created categories. It held that the departure from the traditional view of hearsay was towards an approach governed by the principles which underlie the rule and its exceptions alike. The movement towards a flexible approach was motivated by the principle that reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination. The preliminary determination of reliability is, therefore, to be made exclusively by the trial judge before the evidence is admitted.

3.49 The Canadian approach has been adopted in New Zealand where the Court of Appeal has formulated a new general residual exception to the hearsay rule based on the criteria of relevance, inability and reliability.⁷⁸

(8) Conclusions

3.50 It is clear from this, relatively brief, discussion that the Irish courts favour a case-by-case approach to the inclusionary exceptions to the hearsay

⁷⁵ Australian Law Reform Commission *Report on Uniform Evidence Law* Report 102, (2005) at paragraph 8.52-8.58.

⁷⁶ [1990] 2 SCR 531.

⁷⁷ [1992] 2 SCR 915.

⁷⁸ *Manase v R* [2000] NZCA 322, 423. Collins notes that the exception created by the New Zealand court is more limited than the approach of the Canadian courts. The court in *Manase v. R.* was critical of the scope of the Canadian exception which they claimed diluted the admission of hearsay "to little more than relevance coupled with a sufficient degree of reliability".

rule. Indeed, the Commission notes that, by contrast with other countries, the Irish courts have studiously avoided any move towards the kind of general “inherent reliability” test developed in, for example, Australia or Canada. The Commission has, accordingly, come to the provisional view that any reform of the law in this area should be based for the present on retaining the existing exceptions. The Commission discusses in more detail any future judicial role in the hearsay rule in Part D, below.

3.51 *The Commission provisionally recommends that the existing inclusionary exceptions to the hearsay rule should be retained, and notes that these include:*

- *Admissions and confessions;*
- *Spontaneous statements connected with the subject matter of the case (the res gestae);*
- *Dying declarations (currently admissible only in a murder and manslaughter case);*
- *Certain statements of persons since deceased (including statements by testators concerning the contents of their wills);*
- *Public documents; and*
- *Certain statements made in previous proceedings.*

3.52 *The Commission provisionally recommends that the existing inclusionary exceptions to the hearsay rule should not be replaced by a general inclusionary approach based on inherent reliability.*

D Judicial Reform of the Hearsay Rule

3.53 In this Part, the Commission considers to what extent, assuming statutory reform of the hearsay rule, continued judicial reform of the rule – in particular the inclusionary exceptions – should remain a feature of the law. There is a great deal of divergence between the approaches of the courts in different common law countries regarding the appropriate judicial role in this respect. As the Commission has already noted, the UK House of Lords effectively rejected judicial development of the rule in *Myers v DPP* whereas the Supreme Court of Canada has been quite proactive in the continued judicial development of inclusionary exceptions to the hearsay rule. The Commission now turns to examine in more detail the approach of the Irish courts in a comparative setting.

(1) Ireland

3.54 The Irish courts have not ruled out broadening or narrowing the hearsay rule by judicial development. In *Eastern Health Board v MK*⁷⁹ the issue arose as to whether the courts could expand the inclusionary exceptions. Denham J stated that merely because the Oireachtas had enacted inclusionary exceptions to the hearsay rule did not preclude the courts from doing likewise. She added that the hearsay exceptions and its rules are “not set in stone” and the court retains the jurisdiction to develop the law on the use of hearsay evidence. Keane J, reflecting a view he applied consistently in other cases,⁸⁰ was more sympathetic to the argument that any major new exception to the hearsay rule would be best effected by the Oireachtas. He referred to the exceptions designed “to avoid the injustice and inconvenience which would flow from an unyielding adherence to the rule”, and he did not discount the possibility of newly judicially created exceptions grounded on the twin criteria of necessity and reliability which he identified as the common underlying features of exceptions to the hearsay rule.

3.55 In *Borges v The Medical Council*⁸¹ Keane CJ left open the question as to whether the Canadian approach of developing exceptions to the hearsay rule based on the requirements of necessity and reliability (discussed below) would be followed by the Irish courts. As already discussed, however, he concluded that the circumstances of that case did not justify creating an inclusionary exception that would have deprived the applicant of his right to fair procedures under the Constitution.

3.56 McGrath argues that the decisions in *Eastern Health Board v. MK*⁸² and *Borges v The Medical Council*⁸³ “indicate a consistent view on the part of the Court that the hearsay rule is not merely a rule of evidence but has a

⁷⁹ [1999] 2 IR 99.

⁸⁰ In *The People (DPP) v Marley* [1985] ILRM 176, discussed at paragraphs 5.05ff, below, the Court of Criminal Appeal (whose judgment was delivered by Keane J) indicated that further reform of the hearsay rule was primarily a matter for the Oireachtas, and the Court referred to the proposals for reform made by the Commission in its 1980 *Working Paper on the Rule Against Hearsay* (LRC WP 9-1980). By the time the Commission published its *Report on the Rule Against Hearsay in Civil Cases* (LRC 25-1988), discussed in Chapter 4, below, Keane J had been appointed President of the Commission.

⁸¹ [2004] IESC 9; [2004] 1 IR 103.

⁸² [1999] 2 IR 99.

⁸³ [2004] IESC 9; [2004] 1 IR 103.

constitutional foundation as a requirement of fair procedures and an ingredient of a fair trial.”⁸⁴ He also suggests that it is unlikely the Supreme Court will favour relaxing the hearsay rule to the extent that has occurred in Canada.⁸⁵

“Instead any new exceptions to the hearsay rule, whether specific or of a general residual nature, are likely to have carefully and narrowly drawn parameters with a focus on the two crucial criteria of necessity and reliability.”

3.57 The Commission, in its *Working Paper on the Rule Against Hearsay*⁸⁶ stated that the Irish courts could reject the rigid position adopted by the UK House of Lords in *Myers v. DPP*⁸⁷ and expand the exceptions to the hearsay rule piecemeal. This could cover other categories of case where hearsay evidence is of peculiar reliability. The Commission considered, however, that even if this were done there would be a long period of uncertainty while new exceptions were being evolved judicially.⁸⁸ The Commission considers that this approach remains valid today. The courts may, of course, decide that, in appropriate cases, a new inclusionary approach could be taken in exceptional cases, but the Commission considers that, given the limited number of occasions when such situations arise (especially in a small jurisdiction), it is preferable that parties engaged in civil litigation or criminal trials should have a clear basis on which the rules of evidence are applied.

(2) England

3.58 As already discussed, the UK House of Lords has, since *Myers v. DPP*⁸⁹ resisted developing a general residual judicial discretion to develop inclusionary exceptions to the hearsay rule, despite, as Healy describes “the implausible specificity of many of the exceptions”.⁹⁰ In *Myers* the House of Lords insisted that any further exception could only be created by the UK Parliament.

⁸⁴ McGrath *Evidence* (Thomson Roundhall 2005) at 5.241- 5.242.

⁸⁵ *Ibid.*

⁸⁶ Law Reform Commission *Working Paper on the Rule Against Hearsay* (WP No.9-1980).

⁸⁷ [1965] AC 1001.

⁸⁸ Law Reform Commission *Working Paper on the Rule Against Hearsay* (WP No.9-1980) at 12.

⁸⁹ [1965] AC 1001.

⁹⁰ Healy *Irish Laws of Evidence* (Thomson Round Hall 2004) paragraph 9-62.

The approach in *Myers* was applied by the UK Privy Council in *Patel v Comptroller of Customs*.⁹¹

3.59 Nonetheless, at a narrower level, in 1987 the House of Lords, radically redesigned the *res gestae* exception in *R v. Andrews*,⁹² and this limited judicial development was, as already noted, approved by the Court of Criminal Appeal in *The People (DPP) v Lonergan*.⁹³ To that extent the courts in the UK, and in Ireland, appear prepared, at the least, to engage in judicial development of the existing inclusionary exceptions.

(3) Scotland

3.60 In Scotland the courts have been noticeably more willing than the English courts to create new exceptions to the hearsay rule. In *Lord Advocate's Reference (No. 1 of 1992)*⁹⁴, which involved a prosecution in the Sheriff's Court for social security fraud, the prosecution sought to introduce evidence of remittances generated by a health authority's computer, in respect of which it was not possible to trace the staff member who had made the entries. The circumstances were thus similar to those which arose in *Myers v DPP*.⁹⁵ The Civil Evidence (Scotland) Act 1988 (which defines "civil proceedings" to include criminal proceedings in the Sheriff's Court, the Scottish equivalent of the District Court) contained a general "business records" inclusionary exception (thus, in general, reversing the effect of *Myers*), but a health authority did not come within the definition of a "business" in the 1988 Act. In the trial in the Sheriff's Court, the computer records were held to be inadmissible as hearsay, even though the Sheriff accepted that refusing to admit this type of computer evidence in such cases, where its authors could not be identified and called, presented enormous difficulties for the prosecution.

3.61 On appeal, the Scottish High Court took a different view. Delivering the Court's judgment, Lord Hope stated that it was open to a court to "take account of changing circumstances which may render the continued application of the rule against hearsay unacceptable."⁹⁶ It is noticeable that, in taking a different approach by comparison with the one taken by the UK House of Lords in *Myers*, Lord Hope linked this to the "declaratory" jurisdiction claimed by the

⁹¹ [1965] 3 All ER 593.

⁹² [1987] AC 281. See paragraph 3.27, above.

⁹³ [2009] IECCA 52. See paragraphs 3.24ff, above

⁹⁴ [1992] S.C.C.R. 724.

⁹⁵ [1965] AC 1001.

⁹⁶ *Lord Advocate's Reference (No. 1 of 1992)* [1992] S.C.C.R. 724, 740-741 (Lord Hope).

Scottish High Court to declare conduct to be criminal even where it is not already covered by existing criminal law, in effect a power to declare new crimes (the Commission notes that this asserted power must be regarded in Irish law as controversial, bearing in mind the prohibition in Article 15.5 of the Constitution of Ireland on the Oireachtas declaring acts to be infringements of the law which were not so at the time of their commission). Lord Hope added that this asserted power of the Scottish courts must never be applied arbitrarily and ought only to be done by developing the application of well-established principles of law. For this reason, he accepted that it would be possible to create an inclusionary exception to allow computer records to be introduced as evidence where it was not reasonably practicable to obtain any other evidence, because this followed recognised principles of existing law.

3.62 The Scottish High Court may be protective of its jurisdiction to alter the hearsay rule judicially, but Duff notes that it has been criticised for tending to proceed stealthily through the use of “hearsay fiddles” in the creation of new exceptions.⁹⁷ In *Muldoon v Herron*⁹⁸ a majority of the Scottish High Court approved a Sheriff’s decision to admit police evidence of the prior identification of the defendants by two witnesses who claimed to be unable to identify them in court. The High Court held that this was direct evidence that simply filled the gap in the witnesses’ testimony and thus was admissible. Both witnesses agreed in court that they had pointed out various people shortly after the crime to the police, but one witness claimed that the defendants were not the people that she had pointed out. Commentators have not been convinced of the majority’s reasoning that the police evidence was not hearsay⁹⁹ and have tended to prefer the views of the dissenting judge, Lord Wheatley, who stated that rather than filling a gap in the eye-witnesses’ evidence, the effect of the police evidence was to contradict it.¹⁰⁰ He stated that if the rules of evidence were to be changed it was a matter for the legislature.¹⁰¹

3.63 An even greater departure from the hearsay rule in an inclusionary direction occurred in *Smith v HMA*.¹⁰² Here the witness, who was unable to

⁹⁷ Duff “Hearsay issues: a Scottish perspective” (2005) *Criminal Law Review* 525, 533.

⁹⁸ (1970) JC 30.

⁹⁹ See Duff “Hearsay issues: a Scottish perspective” (2005) *Criminal Law Review* 525, 533; Dennis *The Law of Evidence* (2nd ed, Sweet and Maxwell, 2002) at 592-593; Zuckerman *The Principles of Criminal Evidence* (Clarendon, 1989) at 197.

¹⁰⁰ *Muldoon v. Herron* (1970) JC 30, 39.

¹⁰¹ *Ibid* at 40-41.

¹⁰² (1986) SCCR 135.

make a definitive identification in the courtroom, claimed that at the identification parade she had said “I think it is No.2” but the police claimed that she had said “it is No.2” and it was held that the police evidence could be used to establish that she had identified the accused despite the fact that the witness did not accept the police testimony.

3.64 This style of police evidence of prior identification by a witness is recognised to be hearsay evidence¹⁰³ but it appears to form a new exception to the hearsay rule. In its 1995 *Report on Hearsay Evidence in Criminal Cases*, the Scottish Law Commission referred to the admissibility of such prior identification as “a well-recognised exception to the general rule”¹⁰⁴ and it has been generally accepted as a new exception created by the court in *Muldoon* and confirmed in ensuing cases. Ultimately, on foot of the Scottish Law Commission’s 1995 Report, the matter is now dealt with in legislative form in sections 17 to 20 of the *Criminal Justice (Scotland) Act 1995*, which deal with hearsay generally in criminal proceedings in Scotland.

(4) Canada

3.65 The Supreme Court of Canada has also taken a different approach to extending inclusionary exceptions to the hearsay rule, if one is to compare it with that taken by the UK House of Lords in *Myers v DPP*.¹⁰⁵ The Supreme Court of Canada does not provide an exhaustive definition of hearsay, instead preferring to define hearsay by reference to its key characteristics. An out-of-court statement is therefore treated as hearsay if it is introduced as proof of the truth of its contents and it was obtained in the absence of contemporaneous cross-examination.¹⁰⁶ This appears to correspond, broadly, with the approach taken in Irish law by the Supreme Court in *Cullen v Clarke*.¹⁰⁷ In what is regarded as a landmark decision in Canadian law, *R v Khan*,¹⁰⁸ the Supreme Court of Canada did not follow the approach taken in *Myers*, preferring to continue the route of allowing judicial development of hearsay exceptions. The

¹⁰³ In *Frew v. Jessop* [1990] SLT 396, 398 Lord Justice Clerk Ross accepted that there was “[n]o doubt [such] evidence is hearsay evidence but it is hearsay evidence which forms an exception to the general rule that hearsay is admissible”.

¹⁰⁴ Scottish Law Commission *Evidence: Report on Hearsay Evidence in Criminal Cases* (No.149, 1995) at paragraph 7.3.

¹⁰⁵ [1965] AC 1001.

¹⁰⁶ *R v Starr* [2000] SCR 144.

¹⁰⁷ [1963] IR 368: see the discussion at paragraph 2.04, above.

¹⁰⁸ [1990] 2 SCR 531.

Court took this approach even though many Canadian legislatures had already enacted legislation to ensure that the outcome arrived at by the UK House of Lords in *Myers v DPP* would not follow in Canada. The *Khan* decision created some uncertainty as to whether the legislative or judicial reform was definitive. Nonetheless, the approach in *Khan* has been affirmed by the Court in *R v Smith*,¹⁰⁹ *R v O'Brien*¹¹⁰ and *R v Khelawon*.¹¹¹ There has been some controversy over whether the approach adopted in these decisions has replaced or merely supplemented a category-based approach to hearsay exceptions, but the general view is that the scope of admissible evidence has been considerably broadened.¹¹²

3.66 The stance adopted by the Canadian courts to the hearsay rule and its exceptions involves a principle-based approach. The effect of these decisions by the Supreme Court of Canada is that hearsay evidence is admissible if the evidence meets two criteria: that the evidence is necessary and reliable and that the probative value of the evidence is not outweighed by its prejudicial effect. Case law establishes that the necessity criterion will be satisfied if the hearsay evidence is reasonably necessary to prove a fact in issue, the relevant direct evidence is not available, and that evidence of the same quality cannot be obtained from another source.¹¹³ The rationale for this new approach to the admissibility of hearsay evidence was articulated by Lamer CJ in *R v. Smith*¹¹⁴, where he stated:

“The movement towards a flexible approach was motivated by the realisation that, as a general rule, reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination... Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity”.

3.67 Lamer CJ qualified the principles of necessity and reliability as follows:

“In my opinion hearsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, where the circumstances under which the statements

¹⁰⁹ (1992) 94 DLR (4th) 590.

¹¹⁰ [1978] 1 SCR 591.

¹¹¹ [2006] 2 SCR 787, 2006 SCC 57.

¹¹² See Carter “Hearsay: Whether and Whither” (1993) 109 LQR 573.

¹¹³ *R v Khan* [1990] 2 SCR 531 at 29 and *R v Smith* [1992] 2 SCR 915 at 34-36.

¹¹⁴ (1992) 94 DLR (4th) 590.

were made satisfy the criteria of necessity and reliability set out in [R v] *Khan* and subject to the residual discretion of the trial judge to exclude the evidence when its probative value is slight and undue prejudice might result to the accused.”¹¹⁵

3.68 In *R v Starr*¹¹⁶ the Supreme Court of Canada held that the principled approach preferred by the Court could be used not only to reform the existing exceptions but also to exclude hearsay falling within an otherwise valid exception if there were insufficient indicia of necessity and reliability in the particular circumstances of the case.¹¹⁷

(5) United States

3.69 At federal level in the United States, rule 807 of the *Federal Rules of Evidence* (1975) prohibits the courts from creating new inclusionary exceptions. Although rule 807 contains a residual exception for evidence with a “circumstantial guarantee of trustworthiness” this is clearly a discretion rather than a rule of law. The US approach has been criticised on the grounds that the wording of the rule is problematic; in particular, that the requirement of equivalent circumstantial guarantee is incoherent as the very fact that it has not fitted into any of the other exceptions may indicate that there is no such guarantee.

(6) Australia

3.70 As already noted,¹¹⁸ in *Walton v R*,¹¹⁹ Mason CJ first articulated in the High Court of Australia a new inclusionary exception based on a test of “inherent reliability”. This was followed in *Pollitt v R*¹²⁰ when the Court developed an exception for implied assertions made in social telephone conversations. Collins notes that, unlike the inherent reliability exception, the telephone exception was clearly formulated as a non discretionary exception.¹²¹ The exception qualifies the hearsay rule so as:

¹¹⁵ *Ibid* at 273-274.

¹¹⁶ [2000] SCR 144

¹¹⁷ *Ibid* at 214.

¹¹⁸ See paragraphs 3.45ff, above.

¹¹⁹ (1989) 166 CLR 283. See paragraph 3.45, above.

¹²⁰ (1992) 174 CLR 558.

¹²¹ Collins “New Exceptions or Principled Determinations: The Unreliable Response of the Australian High Court to the Reform of the Hearsay Rule” (2003) 10 (4) *Murdoch University Electronic Journal of Law* available at <http://www.murdoch.edu.au/elaw/issues/v10n4/collins104.html>.

“not to preclude the receipt of evidence of contemporaneous statements made by one party to a telephone conversation (either in the middle of the conversation or immediately before or after it) which disclose that the other party against whom it is sought to lead otherwise relevant and admissible evidence of that part of the conversation which was overheard”.¹²²

The rationale for the exception is that statements identifying the other party to the telephone conversation possess a minimal risk of fabrication and are generally of high probative value. It only extends to statements which identify the other party to the telephone conversation and is not a general ‘catch-all’ exception for any statement overheard in a telephone conversation merely because they were made through the medium of a telephone.¹²³ Following the decision in *Pollitt v R* the telephone exception was given partial statutory effect in the Australian *Evidence Act 1995*.

3.71 It should be noted that the new departure appears to have been cut short in the late 1990s with the Court noting in *Papakosmas v R*¹²⁴ that no new inclusionary exceptions to the hearsay rule had been created since *Myers v DPP*.

(7) New Zealand

3.72 The New Zealand courts have been unwilling to engage in judicial creation of new inclusionary exceptions. Commentators have remarked on the tendency of the New Zealand criminal courts to approach hearsay problems in an overly-technical and rule-based fashion.¹²⁵ The New Zealand Court of Appeal has distanced itself from creating a reliability-based exception to the hearsay rule and in *R v Manase*¹²⁶ it was critical of what it perceived to be the low and imprecise standard of “necessity” in Canada. It criticised the Canadian standard as allowing hearsay to be introduced in circumstances which depend on little more than the trial judge’s subjective opinion that, given relevance and a sufficient degree of reliability, it would be desirable to admit it. The Court

¹²² *Walton v. R* (1989) 166 CLR 283 at 342 (Deane J).

¹²³ It also appears that the exception should only be available when there is no significant possibility of fabrication: *Pollitt v R* (1992) 174 CLR 558, at 629 (Deane J); and is limited to ordinary social and business calls, and thus excludes conversations made in pursuance of a criminal venture: (1992) 174 CLR 558, at 640 (McHugh J).

¹²⁴ (1999) 164 ALR 548.

¹²⁵ Optican “Hearsay and Hard Case” (1994) NZLJ 48 at 49.

¹²⁶ [2007] 2 NZLR 197.

recognised, however, a “general residual exception” based on the requirements of relevance, inability to testify and threshold reliability. This is subject to an overarching safeguard of a residual discretion to exclude evidence where its prejudicial value outweighs its probative value.

(8) Conclusions

3.73 The Commission notes that the Irish courts have regularly commented that, bearing in mind the importance of the right to fair procedures under the Constitution of Ireland, the hearsay rule should not be applied in such a rigid manner that it operates to work an injustice. At the same time, they have emphasised that the right to cross-examine in criminal trials would prevent the development of a wide-ranging inclusionary approach.

3.74 While the Irish courts have not completely ruled out the Canadian approach, it is clear that no enthusiasm has been indicated for that approach either. Rather, the Irish courts appear to lean towards modest reform of existing inclusionary exceptions if required. The Commission has already provisionally concluded that it does not propose to take either a completely inclusionary approach to reform or a completely exclusionary one. In that light, it would seem appropriate to continue to have in place a judicial discretion to determine whether hearsay evidence may be included or excluded in an individual case.

3.75 *The Commission provisionally recommends that the courts should retain the discretion to determine whether hearsay may be included or excluded in an individual case.*

CHAPTER 4 REFORM OF THE HEARSAY RULE IN CIVIL CASES

A Introduction

4.01 In this Chapter, the Commission discusses reform of the hearsay rule in civil cases. In Part B the Commission discusses the current law in Ireland as it operates in practice, including the use of documentary hearsay. The Commission also examines the, relatively limited, legislative amendments made to date and also examines the impact of legislative provisions concerning electronic evidence.

4.02 In Part C the Commission examines its 1988 *Report on the Rule Against Hearsay in Civil Cases*, in which the Commission's central recommendation was that hearsay should, in general, be admissible in civil proceedings. In Part D the Commission examines reform of the hearsay rule in civil cases in other States and notes a general trend towards an inclusionary approach, although there is no consensus as to how this is achieved.

4.03 In Part E the Commission sets out and considers options as to how the hearsay rule should be dealt with in civil cases in Ireland: to maintain the current position; to allow partial admission of hearsay evidence in civil proceedings; to abolish the hearsay rule in civil proceedings subject to statutory safeguards and to allow judicial discretion to admit hearsay evidence. The Commission then sets out its detailed provisional recommendations for reform.

B Overview of the Current Law in Ireland

4.04 During the second half of the 20th century, a dominant view, though not a consensus, emerged that civil proceedings should be differentiated from criminal proceedings in two important respects, with important implications for the hearsay rule. Unlike an accused, parties in a civil case do not require special protection from a mistaken verdict and, unlike a suspect, a potential party to civil proceedings does not need protection from illegal, unfair or improper treatment in the manner in which evidence was obtained. On both grounds, it was thought that the hearsay rule should not be applied in civil proceedings with the same severity as in criminal proceedings; and, as a result in a number of countries the hearsay rule has moved towards a largely inclusionary approach. Thus, in civil cases hearsay is, in general, admissible in,

for example, England¹, Northern Ireland,² Scotland,³ Australia⁴, South Africa⁵, and the United States.⁶ In general, this has been justified on the basis of a combination of: the absence (usually) of juries in civil proceedings; that the consequences in terms of outcomes in civil litigation are different; but, perhaps just as importantly, that civil proceedings often involve sufficient procedural protections, such as advance disclosure and discovery of documents, that any potential prejudice arising from the introduction of hearsay is minimised. The need to minimise potential injustice in civil proceedings has, of course, been reiterated many times in the courts, notably by the Supreme Court in *Kiely v Minister for Social Welfare (No. 2)*.⁷

(1) Hearsay in general in civil proceedings

4.05 In Ireland the hearsay rule applies, in principle, equally to civil and criminal cases. In practice, however, in civil cases, parties are free to, and often do, waive any objections to evidence which is hearsay, notably in the case of documentary information and expert reports. For example in *Shelley-Morris v Bus Átha Cliath*,⁸ a personal injuries action, the Supreme Court noted that it had been agreed between the parties that medical reports from the United Kingdom would be received into evidence in substitution for oral evidence. Similarly, in *Hughes v Staunton*,⁹ a medical negligence claim, the parties mutually consented to admitting a “book of records” containing, for example, medical records which had been discovered on affidavit by all the parties. In the High Court, Lynch J agreed to admit the documents although he noted that “[m]erely because a book of documents has been discovered on affidavit by a party does

¹ In England, the hearsay rule in civil proceedings has long been subject to legislative change in an inclusionary direction, beginning with the *Evidence Act 1938* and culminating with comprehensive reform in the *Civil Evidence Act 1995*.

² *Civil Evidence (Northern Ireland) Order 1997* (SI 1997/2983) (NI No.21). The 1997 Order in Council (the equivalent of an Act in the pre-1998 devolution context) largely replicates for Northern Ireland the provisions in the English *Civil Evidence Act 1995*.

³ *Civil Evidence (Scotland) Act 1988*.

⁴ *Evidence Act 1995*.

⁵ *Law of Evidence Amendment Act 1988*.

⁶ *Federal Rules of Evidence* (1975).

⁷ [1977] IR 267, discussed in detail in Chapter 2, above.

⁸ [2003] 1 IR 232, at 238.

⁹ High Court 16 February 1990.

not prove that the contents of such documents are accurate or reliable. However the parties agreed that I could read their books of discovery and take them into account to such extent as I thought proper even though strictly speaking many of these documents are pure hearsay.” Lynch J in discussing the hearsay quality of the evidence stated:

“[T]here are medical notes, clinical notes, nursing notes, reports of tests and reports from doctors all emanating from the plaintiff’s stay in [two hospitals] in... England... No witness was called from either of these English hospitals and therefore the statements of fact and the conclusions in all these documents are strictly speaking pure hearsay. On the other hand, if for example nurses had been brought over from England with a view to their verifying entries made by them in the nursing notes in those hospitals it is likely that at the trial before me just five years later many if not all of the nurses would have no actual recollection of the events described in the notes... I do not need the nurses to tell me that they would not make fictitious entries in a patient’s nursing notes; that goes without saying because it would be such an extraordinary event if a fictitious entry were to be made. The notes are therefore quite reliable and probably every bit as good as if a nurse were called to verify them provided that there is no ambiguity or uncertainty in them and even though they are technically speaking pure hearsay.”

4.06 Lynch J concluded that it was sensible of the parties to agree that he may read and have regard to the documents. He also referred to the potential problem which could have arisen in the case if the approach taken by of the UK House of Lords in *Myers v Director of Public Prosecutions*¹⁰ (albeit a criminal case) had been applied in the *Hughes* case itself. Lynch J noted that, for civil proceedings, the English *Civil Evidence Act 1968* (since replaced by the *Civil Evidence Act 1995*) had removed this difficulty and he considered that similar reform should take place in Ireland. He added:

“The [UK] Parliament has long since amended the law of evidence to cope with the foregoing problem and our Law Reform Commission issued a report entitled *The Rule against Hearsay in Civil Cases* on the 10 September 1988 which hopefully will soon result in remedial legislation in this State”.

¹⁰ [1965] AC 1001.

4.07 As already noted,¹¹ while the Oireachtas implemented some elements in the Commission's 1988 Report, the general recommendation on reform of the hearsay rule in civil proceedings has yet to be implemented.

4.08 As the Commission noted in Chapter 2, above, administrative adjudicative bodies, such as a social welfare appeals officer, are required to act fairly and in accordance with the requirements of constitutional fair procedures. In *J & E Davy v Financial Services Ombudsman*¹² Charleton J reiterated that tribunals are entitled to some latitude as to how they order their procedures but they may not imperil a fair resolution of a conflict in consequence of adopting a procedure which infringes fundamental principles of constitutional fairness.¹³ Echoing the Supreme Court in *Kiely v Minister for Social Welfare (No. 2)*,¹⁴ Charleton J stated:

"Tribunals are entitled to depart from the rules of evidence, they are entitled to receive unsworn evidence, they are entitled to act on hearsay and they are entitled to ensure that procedures, unlike court procedures, are informal. The guiding principle is evenness of treatment towards each side... If oral evidence is heard from one side then both sides must be entitled to make such submissions. If one party is allowed to call and cross-examine a witness, then the other party should have the same facility. It is impermissible for instance to hear oral submissions from one party but have to confine the other to written submissions".¹⁵

Charleton J also cited with approval the following comments of Barron J in *Flanagan v University College Dublin*:¹⁶

"[P]rocedures which might afford a sufficient protection to the person concerned in one case, and so be acceptable, might not be acceptable in a more serious case. In the present case, the principles of natural justice involved relate to the requirement that the person involved should be made aware of the complaint against them and should have an opportunity both to prepare and to present their defence. Matters to be considered are the form in which the complaint should be made, the time to be allowed to the person

¹¹ See the Introduction, paragraph 9, above, and paragraph 4.10, below.

¹² [2008] IEHC 256.

¹³ [2008] IEHC 256, para 54.

¹⁴ [1977] IR 267, discussed in detail in Chapter 2, above.

¹⁵ *Ibid.*

¹⁶ [1988] IR 724, at 730-731.

concerned to prepare a defence, and the nature of the hearing at which that defence may be presented. In addition depending upon the gravity of the matter, the person concerned may be entitled to be represented and may also be entitled to be informed of their rights. Clearly, matters of a criminal nature must be treated more seriously than matters of a civil nature, but ultimately the criterion must be the consequences for the person concerned of an adverse verdict.”

(2) Statutory reform of the hearsay rule in civil proceedings

4.09 Unlike the position in a number of other countries discussed below, there has been no general statutory reform of the hearsay rule in civil cases in Ireland. In practice, of course, parties in civil litigation are free to waive their objection to evidence that technically constitutes hearsay, such as expert reports and documentary information as a matter of procedural convenience or mutual benefit.¹⁷

4.10 In addition to the general proposals for reform of the hearsay rule in civil proceedings made in the Commission’s 1988 *Report on the Rule Against Hearsay in Civil Cases*,¹⁸ the Commission had recommended that, in family proceedings, out-of-court statements made by children should be admitted in certain circumstances, subject to specific safeguards. While the general proposals for reform have yet to be implemented by the Oireachtas,¹⁹ this specific recommendation was implemented by section 23 of the *Children Act 1997*. Section 23 of the 1997 Act provides for the admission of hearsay evidence of any fact in all proceedings relating to the welfare of a child, public and private and it also applies in cases relating to any person who has a mental disability to such an extent that independent living is not feasible. Once the statement is admissible the court must then assess what weight to attach to it. Section 24(2) of the 1997 Act sets out five factors that the court should have particular regard to:

- (a) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated,
- (b) whether the evidence involves multiple hearsay,

¹⁷ As in *Shelley-Morris v. Bus Átha Cliath* [2003] 1 IR 232 at 238 and *Hughes v Staunton* High Court, 16 February 1990, discussed above.

¹⁸ *Report on the Rule Against Hearsay in Civil Cases* (LRC 25-1988).

¹⁹ The Commission understands that preparatory work on a Government *Civil Evidence Bill*, based on the Commission’s draft Bill in the 1988 Report, had been initiated in the early 1990s, but that this did not proceed to the publication of a Bill.

(c) whether any person involved has any motive to conceal or misrepresent matters,

(d) whether the original statement was an edited account or was made in collaboration with another for a particular purpose, and

(e) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

4.11 In *Eastern Health Board v Mooney*²⁰ the High Court considered the giving of hearsay evidence in proceedings initiated under the *Child Care Act 1991*. Carney J held that hearsay evidence can be admissible in such cases where appropriate. Section 25 of the *Children Act 1997* allows evidence regarding the credibility of the child to be admitted, even though the child is not strictly speaking a witness.

4.12 Section 26 of the 1997 Act also allows a copy of any document to be admitted in evidence in proceedings where section 23 permits hearsay to be admitted. A document for these purposes includes a sound recording and a video recording and the document need not be an original, nor is it necessary to prove that the original document is still in existence.

(3) Documentary Hearsay Evidence

4.13 Unlike in criminal proceedings (as to which see Part II of the *Criminal Evidence Act 1992*, discussed in Chapter 5), there is no general legislative provision to admit hearsay evidence in civil proceedings and such evidence is only admitted if parties consent. The *Bankers' Books Evidence Act 1879* as amended (notably by the *Bankers' Books Evidence (Amendment) Act 1959*)²¹ provides for the admissibility of copies of entries from the books and records of banks against any person as *prima facie* evidence. There is a wide definition of "bankers books" in the 1879 Act, as amended, and this includes any records used in the ordinary course of the business of a bank or used in the transfer department of a bank acting as a register of securities. It has been held, however, that the 1879 Act does not extend to items of correspondence and that it cannot be interpreted as permitting a banker to give secondary evidence of mere correspondence, the removal of which could hardly upset the conduct of the business of the banker.²² In order for an entry in the bankers' book to be

²⁰ High Court 28 March 1998.

²¹ The *Bankers' Books Evidence Act 1879* as amended is discussed in detail in the Commission's *Consultation Paper on Documentary and Electronic Evidence* (LRC CP 57-2009).

²² *JB O'C v PCD* [1985] IR 265, at 274.

admissible, it must be proved by the person seeking to admit the copy that the original document falls within the remit of the Act and it must also be proved that the copy is an original copy.

4.14 A court may not accept documentary hearsay evidence where it is contradicted by oral evidence in the case. In *Moloney v Jury's Hotel plc*²³ the Supreme Court noted that during the course of the High Court hearing in the case, the doctors who were the authors of the medical reports concerning the plaintiff had never been called to give evidence and the statements in the reports tending to discredit the plaintiff were held to be clearly hearsay:

“[T]he learned trial judge referred to two hospital notes which he assumed tended to undermine a portion of the plaintiff’s evidence and to support that of [another witness]. The trouble is that neither note is evidence. While either note could have been put to the plaintiff in cross-examination (and one was) the cross-examiner would have been bound by her answer. The persons who made these notes were not called to give evidence. ... These notes are of no evidential value and should not have been used by the trial judge.”

(4) E-Commerce and Hearsay

4.15 As already noted, oral evidence is often given strong preference over other forms of evidence. Such evidence can only be admitted, however, if it comes from the person who had direct knowledge of the matter to which he or she refers. Therefore, the hearsay rule in general specifies a document cannot be used as evidence if its author does not witness it.

4.16 In recent years a number of statutory provisions have been introduced into the tax code in order to address the hearsay rule as it affects computer generated evidence.²⁴ Broadly, these provisions were designed to allow a court to admit computer evidence even though it was hearsay. Irish law, at present, with few exceptions treats computer records as hearsay. There is, currently, no general legislation which has adapted the rules of evidence, particularly the rule against hearsay, to take account of computer technology.

²³ Supreme Court 12 November 1999.

²⁴ For example section 917L(4) of the *Taxes Consolidation Act 1997* (inserted by the *Finance Act 1999*) provides that “unless a judge or any other person before whom proceedings are taken determines at the time of the proceedings that it is unjust in the circumstances to apply this provision, any rule of law restricting the admissibility or use of hearsay evidence shall not apply to a representation contained in a document recording information which has been transmitted in accordance with section 917F(1) [which deals with the electronic transmission of returns.]”

The Commission has discussed this matter in its *Consultation Paper on Documentary and Electronic Evidence*.²⁵

C The Commission's 1988 Report on the Rule Against Hearsay in Civil Cases

4.17 In its 1988 *Report on the Rule Against Hearsay in Civil Cases*²⁶ the Commission examined the main reasons for excluding hearsay. The Commission noted that the rule against hearsay is not without justification or rationale and that it is clearly preferable that evidence be given orally in court and be testable by cross examination.²⁷ The Commission added, however:

“[T]his principle should be applied in a flexible and common sense manner, should not be so complex as to be incapable of consistent application or of being understood, should not operate unfairly on parties and witnesses, should not exclude relevant evidence of probative value and should not add to costs and time both in and out of court.”²⁸

4.18 The Commission therefore recommended that the exclusionary hearsay rule should be retained as a general statement of principle but that the inadequacies of the law governing hearsay in civil cases could be resolved by providing that hearsay in civil cases would be admissible in circumstances where certain circumstances would be met. The Commission recommended that an out-of-court statement should be admissible as evidence of any fact in it if:

- the witness is unavailable because he or she is dead or is unable to attend to testify because of their health or cannot be identified or found;
- the witness, being a competent and compellable witness, refuses to be sworn or to testify;
- the witness is outside the State and it is not possible to obtain his or her evidence;
- the other parties are notified in advance (unless the court exercises its discretion to waive this requirement) and
- the statement is proved in court to be the best available evidence.

²⁵ LRC CP 57-2009.

²⁶ LRC 25-1988.

²⁷ *Ibid* at 6.

²⁸ *Ibid*.

4.19 In its Report the Commission recommended that a statement should be defined to include any oral or written utterance and conduct which is intended to be assertive. It recommended that no distinction should be made between first-hand and multiple hearsay.

4.20 The Commission advocated that three specific safeguards were to be observed before the hearsay evidence could be admitted, namely:

- The court should have a discretion to exclude any out-of-court statement which is of insufficient probative value;
- The admissibility of the evidence should be conditional on the person who is the source of the information being called and subjected to cross-examination whenever he or she is available; and
- Advance notice should be required of the intention to call such evidence unless the court in stated circumstances waives that requirement.

4.21 The Commission considered that this “safeguarded inclusionary approach” was preferable to an exclusionary approach which may be rigidly applied subject to the recognised exceptions. The Commission was of the view that the existing exclusionary approach “must carry the serious risk that valuable and relevant evidence not coming within any of the specific exceptions will be excluded”.²⁹ The Commission also noted that the reasoning on this matter in its 1980 *Working Paper on the Rule Against Hearsay*³⁰ which preceded the Report “had not evoked any dissent and is in line with the approach adopted in some other common law jurisdictions”.³¹

4.22 The Commission also considered in the 1980 Working Paper the desirability of excluding second-hand hearsay in any scheme of reform. It referred to the views of the English Law Reform Committee in its 1966 *Report on Hearsay Evidence in Civil Proceedings*³² that allowing such evidence would run the risk of allowing all sorts of rumour to be admitted and involve the risk of “proliferation of hearsay evidence of minimal probative value”. Nonetheless, the Commission in its Working Paper did not recommend restricting the categories of hearsay evidence which are admissible as it believed this could result in valuable evidence being excluded. The Commission in its Working Paper and

²⁹ *Report on the Rule Against Hearsay in Civil Cases* (LRC 25-1988) at 7.

³⁰ LRC WP No.9-1980.

³¹ *Report on the Rule Against Hearsay in Civil Cases* (LRC 25-1988) at 7.

³² Law Reform Committee, 13th Report, *Hearsay Evidence in Civil Proceedings* (1966) para. 15. The Committee’s functions were taken over by the English Law Commission, which was established in 1967.

its Report decided to adhere to the recommendation that it was not desirable to limit the categories of hearsay evidence which are admissible by a requirement that they must be first hand in any sense. A similar approach was taken in Scotland.

4.23 In recommending that a more inclusionary approach be taken towards hearsay in civil cases, the Commission in its 1988 Report placed some weight on the enactment of the *Courts Act 1988* which, in effect, abolished jury trials for most civil claims.³³

4.24 As already indicated, the courts in Ireland have supported the reform proposals made in the 1988 Report³⁴ and the Commission reiterates in this Consultation Paper that it does not see any particular reason to depart from that general approach. Before turning to consider the specific approach the Commission proposes in this Consultation Paper, it is important to review developments in other States.

D Comparative review of reform of the hearsay rule in civil proceedings

(1) The General Trend

4.25 Recent legislative trends in the regulation of civil litigation is to place all relevant evidence before the court and to allow the court decide the weight to be attached to it. While there may be divergent approaches sharing the common law tradition on many elements of hearsay evidence, it is notable that as early as the 1960s, a dominant view, though not a consensus, emerged that civil proceedings are to be differentiated from criminal proceedings.³⁵ In considering reform of the hearsay rule it is important to appreciate the reasons justifying separate treatment of criminal and civil rules of evidence. As already mentioned, unlike an accused, parties to civil proceedings do not require special protection from a mistaken verdict and, unlike a suspect, parties in civil proceedings do not require protection from illegal, unfair or improper treatment

³³ The *Defamation Act 2009* retains juries for High Court defamation claims. Since the enactment of the *Courts Act 1988*, High Court personal injuries actions are heard by a judge alone, without a jury. All civil actions in the Circuit Court (including defamation actions) and in the District Court are heard by a judge alone.

³⁴ See, for example, *Hughes v Staunton* High Court 16 February 1990, paragraph 4.05, above. See also Healy *Irish Laws of Evidence* (Thomson Roundhall 2004) at 257.

³⁵ Zuckerman *The Principles of Criminal Evidence* (Oxford: Clarendon Press, 1989) at 216.

in the manner in which evidence was obtained.³⁶ On both grounds, it is generally considered that the hearsay rule should not be applied in civil proceedings with the same stringency as in criminal proceedings. In its 1988 Report, the Commission also recognised that different considerations apply in criminal proceedings than in civil proceedings.³⁷

4.26 As in Ireland, in many of the common law and other States that have examined reform of the hearsay rule in civil proceedings, the usual mode of civil trial is before a judge who is professionally trained to assess the weight of evidence and it is rare that civil trials are heard before a jury. In England, the Law Commission highlighted this and stated that it can no longer be correct for rules of civil evidence to be based on an assumed separation of tribunals of fact and law when in practice the judge is the sole arbitrator of law and fact. Arguments based on the danger of misleading juries therefore lose their force. The different burden of proof, discovery, the diversity of types of proceedings and the variety of forms of relief being claimed by parties in civil proceedings against each other provide a disparate background from what applies in criminal proceedings and the dangers of miscarriages of justice leading to a loss of liberty are of a different nature.³⁸

4.27 Despite the absence of juries in most civil proceedings in many countries the fact that no consensus has emerged as to how the rule should operate has impeded uniform reform of the rule. The Singapore Law Reform Committee concluded in this respect:

“Major law reform commissions have produced divergent recommendations and none have been compelling. To compound the difficulties, each law reform commission has examined the necessity of reform in different contexts and such proposals as may be made are sometimes peculiar responses to differences in context”.³⁹

4.28 One difficulty in finding a consensus on this may be that civil proceedings in general rely to a higher degree than criminal proceedings on the use of documents. It may be for that reason that civil courts are particularly reluctant to allow the taking of technical points as to hearsay.

³⁶ Singapore Law Reform Committee *Report of the Law Reform Committee on Reform of Admissibility of Hearsay Evidence in Civil Proceedings* (May 2007).

³⁷ *Report on the Rule Against Hearsay in Civil Cases* (LRC 25-1988) at 9.

³⁸ Law Commission Consultation Paper *The Hearsay Rule in Civil Proceedings* (No. 117-1990) at 53.

³⁹ Singapore Law Reform Committee *Report of the Law Reform Committee on Reform of Admissibility of Hearsay Evidence in Civil Proceedings* (2007) at 11.

(2) *Reforms proposed or adopted in other jurisdictions*

(a) *England, Wales and Northern Ireland*

4.29 In England the reform of the hearsay rule in civil proceedings has developed separately and, initially, further in civil proceedings than in criminal proceedings. Under the *Evidence Act 1938* some forms of documentary hearsay were admissible. The *Civil Evidence Act 1968* first provided for the admission of hearsay evidence in civil proceedings on a general statutory basis.⁴⁰ Although it contains limitations on the admissibility of hearsay evidence, the reality is that the 1968 Act in effect swept away, so far as civil cases are concerned, the common law rule against hearsay, and substituted a statutory code which provided for the general admissibility of hearsay evidence subject to important evidential and procedural safeguards. In relation to firsthand hearsay, these safeguards involved the identification of hearsay evidence, followed by notification to the opponent of an intention to use it at trial. The receiver of such notice, not willing to agree on the introduction of the hearsay could issue a counter-notice requiring the attendance of the statement maker. Such a counter notice could be defeated if the maker was dead, abroad, unfit, could not be found or due to the lapse of time could not be expected to remember the issues involved.⁴¹ In such instances the judge had discretion to admit the evidence. Second hand and multiple hearsay were not admissible except for business records but this was limited to records collated by a person with personal knowledge of the records and then passed through a secure chain to storage.⁴² This complex scheme in the 1968 Act was not applied in practice and came under criticism especially in relation to the difficulties surrounding the notice provision and non-documentary statements.⁴³ The 1968 Act was amended by the *Civil Evidence Act 1972* which implemented the recommendations in the English Law Reform Committee's 1966 *Report on Hearsay Evidence in Civil Proceedings*⁴⁴ (referred to in the Commission's 1988 Report) to extend the scope of the 1968 Act to statements of opinion.

⁴⁰ The admission of hearsay evidence was, of course, already permitted in the limited circumstance provided by the common law exceptions.

⁴¹ Sections 2 and 8 *Civil Evidence Act 1968*.

⁴² Section 4 *Civil Evidence Act 1968*. See Peysner "Hearsay is dead! Long live hearsay!" (1998) 2 *Int Journal of Evidence and Proof* 232, 233.

⁴³ The *Civil Evidence Act 1972* provided some legislative reform for statements of opinion and expert evidence and further reform in the area of child law was dealt with by the *Children Act 1989* which allowed hearsay statements to be admitted in proceedings involving the upbringing, maintenance and welfare of children.

⁴⁴ Cmnd 2964, 1966.

4.30 In 1988, the Law Commission in England and Wales was asked to examine the usefulness of the hearsay rule in civil proceedings and in its Consultation Paper and ensuing Report concluded that the old rules were unwieldy, outmoded and overcomplicated.⁴⁵ The Commission noted that the 1968 Act had been enacted in an era preceding the use of computers and photocopiers on an everyday basis. The Law Commission was conscious that the statutory scheme in place did not provide solutions to the practical difficulties that arose in litigation. The Law Commission worked on the assumption that the rule should continue to apply differently in civil and criminal proceedings, with more radical reform reserved for civil proceedings. The new approach in civil cases was to ensure that where possible all relevant evidence was admitted subject to considerations of reliability and weight.⁴⁶

4.31 In their deliberations, the Law Commission considered the two options available to them:

- i. Reforming the *Civil Evidence Act 1968* by making a few amendments and
- ii. Abolition of the hearsay rule in civil proceedings in a similar vein to the abolition of the rule in Scotland in the *Civil Evidence (Scotland) Act 1988*.

The Law Commission was opposed to amending the 1968 Act for three reasons:

- The presumption enshrined in the Act that hearsay should be inadmissible subject to statutory or common law exceptions was at odds with a guiding principle of evidence: that all relevant evidence should be admitted unless there was a cogent reason to exclude it⁴⁷;
- That all issues surrounding hearsay should be dealt with at trial and that the process should avoid surprises at trial⁴⁸ and
- The scheme of the 1968 Act was anachronistic.⁴⁹

⁴⁵ Law Commission Consultation Paper *The Hearsay Rule in Civil Proceedings* (No. 117-1990) and Law Commission Report *The Hearsay Rule in Civil Proceedings* (1993) (Law Com No. 216).

⁴⁶ *Phipson on Evidence* paragraph 29.01.

⁴⁷ Law Commission Consultation Paper *The Hearsay Rule in Civil Proceedings* (No. 117-1990) at 4.5.

⁴⁸ *Ibid* at para 4.9. The Law Commission in recommending that all hearsay be admissible endorsed a system of notice requirements.

4.32 The approach of the Law Commission was that reform should extend not only to first hand hearsay but also to multiple hearsay “of whatever degree and form”.⁵⁰ Nonetheless the Commission still considered it important that the concept of hearsay should continue to be understood and recognised.⁵¹ When introducing what became the *Civil Evidence Act 1995* (which implemented the Law Commission’s recommendations) in the House of Lords, Lord Mackay stated: “The concept of hearsay will remain and hearsay evidence may well be less than direct evidence. But it should not be excluded because it is hearsay.”⁵²

4.33 In England and Wales, under the *Civil Evidence Act 1995*, and in Northern Ireland, under the *Civil Evidence (Northern Ireland) Order 1997*,⁵³ all hearsay evidence is admissible in civil proceedings.⁵⁴ Section 1 of the 1995 Act states: “In civil proceedings evidence shall not be excluded on the ground that it is hearsay.” It should be noted that even before the 1995 Act came into force, the English courts had begun to limit the impact of the hearsay rule in civil proceedings. For instance, in *Secretary of State for Trade and Industry v. Ashcroft*⁵⁵ the Court of Appeal held that the rule did not apply in applications by the Secretary of State for disqualification orders against directors pursuant to section 7 of the *Company Directors Disqualification Act 1986*.⁵⁶

4.34 Section 1 of the *Civil Evidence Act 1995* defines civil proceedings as proceedings “before any tribunal, in relation to which the strict rules of evidence apply, whether as a matter of law or agreement of the parties”. Thus as Hollander notes, if the strict rules of evidence do not apply to the

⁴⁹ For more detailed discussion see Salako “The hearsay rule and the Civil Evidence Act 1995: where are we now? (2000) *Civil Justice Quarterly* 371.

⁵⁰ Law Commission Consultation Paper *The Hearsay Rule in Civil Proceedings* (No. 117-1990) at 4.1

⁵¹ Law Commission Report *The Hearsay Rule in Civil Proceedings* (1993) (Law Com No. 216).

⁵² Hansard HL Vol 564, col. 1050.

⁵³ SI 1997/2983 (NI No.21). The 1997 Order in Council (the equivalent of an Act in the pre-1998 devolution context) largely replicates for Northern Ireland the provisions in the English *Civil Evidence Act 1995*.

⁵⁴ Section 1-10 of the *Civil Evidence Act 1968* and section 1 of the *Civil Evidence Act 1972* were repealed by the *Civil Evidence Act 1995*.

⁵⁵ [1997] 3 All ER 86.

⁵⁶ See also *Re Rex Williams Leisure plc* [1994] 4 All ER 27 on s 8 of the 1986 Act.

proceedings, the 1995 Act does not apply.⁵⁷ The definition of “statement” in section 1 covers opinions but does not extend to implied assertions; this has remained the position since in the original 1968 Act.⁵⁸ The 1995 Act also leaves the position of the common law hearsay exceptions unchanged and these continue to apply as do any statutory exceptions that existed at the commencement of the Act. The admissibility of hearsay evidence under the 1995 Act is subject to considerations of weight and safeguards in the form of certain procedural requirements.

(i) Safeguards

4.35 While the 1995 Act allows for hearsay to be admitted in civil proceedings, there are, as Peyner notes, three procedural hurdles for a party to overcome before such evidence can be adduced in proceedings, namely the need for the adducer to identify the hearsay evidence; the openings available to the receiver of the evidence to test it and the weight to be attached to it by the fact-finder.⁵⁹

- **Notice Provisions**

4.36 Section 2(1) of the *Civil Evidence Act 1995* provides that a party intending to adduce hearsay evidence must give notice of that fact. The requirement to give notice to adduce hearsay evidence unless exempted by the governing rules of court, the *Civil Procedure Rules 1998* (CPR), is mandatory. Despite the mandatory nature of this requirement as set out in section 2(1), section 2(4) of the 1995 Act states that failure to give notice goes to costs and weight but failure to abide with the notice requirement does not affect the admissibility of the evidence. In *Sunley v Gowland*⁶⁰ the Court of Appeal admitted into evidence a surveyor’s and valuer’s report which constituted hearsay evidence despite the failure of the defendants to abide by the notice provisions. Hollander notes that in this respect there is a contrast with other provisions of the CPR, where the court has a discretion to exclude the admission of evidence led in breach of the rules. However, the Law Commission took the view that if this discretion to refuse admission where proper notice was not served was to stand in respect of hearsay evidence, this would only achieve a reintroduction of the hearsay rule.⁶¹

⁵⁷ Hollander *Documentary Evidence* (9th ed Sweet & Maxwell 1999) at 25-06.

⁵⁸ Phipson *Evidence* paragraph 29.03

⁵⁹ Peysner “Hearsay is dead! Long live hearsay!” (1998) 2 *Int Journal of Evidence and Proof* 232, 234.

⁶⁰ [2003] EWCA Civ 240.

⁶¹ Hollander *Documentary Evidence* (9th ed Sweet & Maxwell 1999) at 25-09.

4.37 The dislike of the notification procedures centres on the need to analyse the degree and nature of hearsay in order to provide the other side with proper notification. The Law Commission pointed out that such effort is costly in legal time given the difficulties involved in identifying and classifying hearsay. It points out that much hearsay is uncontroversial and the effort of classification and detailed information of the chain or recording of the statement is unwarranted.⁶²

4.38 The rules of notification are, perhaps unavoidably, complex. The difficulty with the notice provisions was, as noted by the Law Commission, that they had fallen into disuse and that the prescribed time-limits were not complied with. The Law Commission noted for example that the Law Society had commented that the rules were rarely relied on, where a witness had died, disappeared or moved overseas.⁶³ It also noted that the need to serve notices was often considered too late in the day and as a result of the 'slipshod atmosphere' compliance with the notice requirements became the exception rather than the rule, with the parties relying on the discretion of the court to admit the hearsay evidence notwithstanding a failure to comply with the notice procedure or an agreement at trial to admit.⁶⁴ A major criticism of the notice provisions was that they imposed unrealistic requirements. The Law Commission ultimately recommended that all hearsay evidence - first hand hearsay and multiple hearsay - should be admissible in civil proceedings but felt that it was important to retain the concept of hearsay. The Commission recommended a flexible notice provision as a safeguard following the abolition of the exclusionary rule in civil cases "because it seems in accord with the developing 'cards on the table approach'".⁶⁵

- **Requesting further particulars**

4.39 Section 2 of the *Civil Evidence Act 1995* provides that a party can request further particulars; these are "of or relating to the evidence" and might

⁶² Law Commission Consultation Paper *The Hearsay Rule in Civil Proceedings* (No. 117-1990) at 83.

⁶³ Law Commission Report *The Hearsay Rule in Civil Proceedings* (1993) (Law Com No. 216) at 13.

⁶⁴ Law Commission Report *The Hearsay Rule in Civil Proceedings* (1993) (Law Com No. 216) at paragraphs 3.3 -3.7. The Report noted that many experienced practitioners could recall using or receiving hearsay notices less than half a dozen times in their professional lives: *ibid* at 13.

⁶⁵ Law Commission Report *The Hearsay Rule in Civil Proceedings* (1993) (Law Com No. 216) at 23.

deal with circumstances of its creation or the whereabouts of a witness that could not be called.

- **Provision to call the maker of the original statement**

4.40 Section 3 of the *Civil Evidence Act 1995* provides that if one party puts in hearsay evidence of a statement, then the other side, with the leave of the court can call that witness and cross-examine him on his statement. The section provides that the witness can be cross-examined as if the hearsay evidence had been his evidence-in-chief. Peysner notes that the intention of this is to avoid “paper trials”.⁶⁶ Phipson comments that the 1995 Act does not intend that the cross-examination be limited only to the “statement” and states that there may be circumstances “where both sides could equally well lead evidence from the witness or where both sides intend to do so, where the court might properly decide that the right of one party to cross-examine under section 3 should be limited to the statement as a matter of discretion, but that this will not usually be the case”.⁶⁷

- **Attacking the credit of the witness**

4.41 Section 5 of the *Civil Evidence Act 1995* provides that if the receiver wishes to attack the credibility of a witness, that party must notify the adducer of the witness of its intention. This would enable the adducer of the witness to reconsider its decision to call that witness or alternatively assemble supporting testimony or other evidence.⁶⁸

- **Weight to be attached to the evidence**

4.42 The *Civil Evidence Act 1995* introduces a statutory regime of circumstances which may be relevant in weighing hearsay evidence. Section 2(4)(b) contains a general warning that failure to give notice or particulars of hearsay may be taken into account by the court as a matter adversely affecting the weight to be given to the evidence. Section 4 of the *Civil Evidence Act 1995* expressly provides for the weight to be attached to hearsay evidence. Salako comments that the safeguards encapsulated in section 4 have resulted in the best evidence rule being let in by stealth.⁶⁹ Section 4(1) provides that in estimating the weight, if any, that the court should attach to the hearsay

⁶⁶ Peysner “Hearsay is Dead! Long Live Hearsay!” (1998) 2 *Int Journal of Evidence and Proof* 232.

⁶⁷ Phipson *Evidence* paragraph 29.05.

⁶⁸ Peysner “Hearsay is Dead! Long Live Hearsay!” (1998) 2 *Int Journal of Evidence and Proof* 232.

⁶⁹ Salako “The hearsay rule and the Civil Evidence Act 1995: where are we now?” (2000) *Civil Justice Quarterly* 371,374.

evidence in civil proceedings, it should have regard to any circumstances from which an inference could reasonably be drawn as to the reliability or otherwise of the evidence.

4.43 Section 4(2)(a) to 4(f) set out a list of matters to which the court should have regard in determining weight. Peysner comments that these factors in reality constitute a list of discounting factors and that the factors should encourage parties to present their “best evidence” if it is available. Section 4(2)(a) of the 1995 Act instructs the court to regard whether it would be reasonable and practicable for the party to whom the evidence was adduced to have produced the original statement-maker in court as a witness. This should be considered together with whether there was a failure to give notice, particularly if this is done to avoid having to produce an unreliable or dubious witness, or an attempt to conceal an essential witness by accruing hearsay evidence to avoid detection. A further consideration in section 4(2)(b) going to weight is whether the statement is made contemporaneously with the occurrence or existence of the matters stated and a third consideration is whether the evidence involves multiple hearsay.⁷⁰ The court may also take into consideration any motive to conceal or represent matters⁷¹, whether the original statement was an edited account or was made in collaboration with another for a particular purpose⁷² and whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.⁷³

4.44 In essence section 4 allows the judge to focus on the probative value of the evidence to the facts in issue: it requires lawyers and judges to focus on function not form: the evidence may be admissible but is it of any value in proving the facts in issue?⁷⁴

(b) Scotland

4.45 The *Civil Evidence (Scotland) Act 1988* provides another statutory precedent for the option to abolish the rule in civil cases. The 1988 Act followed from the Scottish Law Commission’s 1986 *Report on Corroboration, Hearsay*

⁷⁰ Section 4(2)(c) *Civil Evidence Act 1995*.

⁷¹ Section 4(2)(d) *Civil Evidence Act 1995*.

⁷² Section 4(2)(e) *Civil Evidence Act 1995*.

⁷³ Section 4(2)(f) *Civil Evidence Act 1995*.

⁷⁴ Peysner “Hearsay is Dead! Long Live Hearsay!” (1998) 2 *Int Journal of Evidence and Proof* 232, 233.

*and Related Matters in Civil Proceedings*⁷⁵ but was more radical in scope than the Commission had proposed.

4.46 The 1988 Act abolished the exclusionary rule and it is no longer acceptable in principle to have a general rule which excludes relevant evidence solely on the basis of its hearsay nature. Like the later English 1995 Act, section 2(1)(a) of the 1988 Act states: "In any civil proceedings... evidence shall not be excluded solely on the ground that it is hearsay." The 1988 Act ended the need to distinguish between first-hand and multiple hearsay for the purposes of admissibility. In recommending the abolition of the hearsay rule in civil cases, the Scottish Law Commission considered that the problem of distortion through repetition is better dealt with by permitting the court to consider what weight is to be attached to the hearsay rather than by simply excluding hearsay altogether. A witness giving evidence on hearsay will normally be able to give some explanation as to the source of the information and the circumstances in which it was transmitted. This would provide the court with material on which to judge its weight.⁷⁶ All statements adduced as representations of fact are covered by the definition of 'statement' contained in section 9 of the 1988 Act and that section gives the same treatment to statements of opinion as statements of facts. For all practical purposes this ends the dispute as to whether assertive conduct is or should be treated as hearsay.

4.47 The 1988 Act does not provide a requirement of notification but section 4 permits an additional witness to be called by either party before the start of closing submissions; so if the maker of a statement to be adduced in evidence is available, his presence for cross-examination can be secured, though only with leave of the court. The rationale for a notification requirement is that the notification procedure would ensure that the hearsay elements in evidence were recognised and communicated to the other side in sufficient time for objections to be raised. However, the criticisms of the notification requirement are that it does not relate specifically to particular refinements for special circumstances but to the difficulty of categorising in advance evidence of a hearsay nature. The 1988 Act does not require any notification of the intention to use hearsay evidence. The Law Commission pointed out however that in deciding not to require prior notification the Act may in theory have increased the possibility of unfair surprise at trial and the danger that the weakness of hearsay statements will not be discovered. Section 7 makes provisions for admissibility of negative hearsay in business records.

⁷⁵ Scottish Law Commission, *Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* (Report No 100, 1986).

⁷⁶ *Ibid* para 3.17.

4.48 The abolition of the hearsay rule in the 1988 Act has, it appears, been largely trouble-free although courts are still required to distinguish between hearsay and non hearsay.⁷⁷ Nevertheless the reform in the 1988 Act is a radical one and at times it appears the Scottish courts have had difficulty in adjusting to all the implications of the change in law.⁷⁸

(c) Hong Kong

4.49 In Hong Kong until 1969, the hearsay rule in civil proceedings was governed by the common law, with the addition of several statutory exceptions based on English legislation. The *Evidence (Amendment) Ordinance* (Ord 25 of 1969) largely replaced the common law rule with provisions based on the English *Civil Evidence Act 1968*.

4.50 In 1996, the Hong Kong Law Reform Commission published a *Report on the Hearsay Rule in Civil Proceedings*.⁷⁹ It put forward two options for reform, following those in the English Commission's 1993 Report. The first option was to refine the existing legislation. The second option was to do away with the hearsay rule in civil proceedings altogether. The Hong Kong Law Reform Commission also examined the approach adopted in Scotland under the *Civil Evidence (Scotland) Act 1988*. As already noted the 1988 Act abolished the hearsay rule in civil proceedings in Scotland and removed any requirement for prior notification of hearsay evidence.

(i) The Hearsay Notice and counter notice prior to reform

4.51 Any party who wished to adduce a hearsay statement which was admissible in evidence by virtue of sections 47, 49 or 50 of the *Evidence Ordinance* had to serve a notice on all other parties of his intention to do so not later than 21 days before application was made to set down for trial. A copy of any documentary hearsay statement was required to be served with the notice. If the statement was non-documentary hearsay, admissible under section 47 of the Evidence Ordinance, the party who proposed to adduce it must have given particulars of the maker and the substance of the statement. Reasons must have been stated where the adducer of hearsay could not call the maker of the statement, or where the adducer for some other reason proposed not to call

⁷⁷ *Sanderson v McManus* [1997] 1 FLR 980, 1997 SC (HL) 55.

⁷⁸ For example in *T v T* 2001 SC 337, the Court of Session dealt with the problem that section 2(1)(a) of the 1988 Act did not embody a competence test. There have also been some difficulties raised as to the evidence of expert reports: see *Lenaghan v Ayrshire* 1994 SC 365.

⁷⁹ Law Reform Commission of Hong Kong *Report on Hearsay Rule in Civil Proceedings* (1996).

him. The opposing party must have served a counter-notice within 21 days after service of the hearsay notice if it requires the maker of the hearsay statement to attend court. If such a counter-notice had been served, the party proposing to adduce the hearsay statement had no right to use it in evidence unless the adducer satisfied the court that the maker cannot or should not be called as a witness.

(ii) Residual discretion to admit hearsay evidence

4.52 The operation of the rules on notice is subject to a residual discretion in the court to allow a hearsay statement which was admissible under section 47(1), 49(1) or 50(1) of the Ordinance to be given in evidence despite the fact that the rules have not been complied with.⁸⁰ This discretion is exercisable when the court considers it just to do so. The Hong Kong Law Reform Commission notes that the margin of discretion is wide although there is direction as to the manner it should be exercised in. In *Ford v Lewis*⁸¹, the English Court of Appeal denounced the avoidance of the rules for the purpose of preserving the element of surprise. The rules should not be avoided for tactical reasons. The discretion was meant to be exercised to overcome the party's inadvertence or inability to comply. The discretion may be exercised in favour of admission despite non-compliance where refusal to admit the evidence might otherwise compel one side to call the opposing party or his servant or agent.

(iii) Further safeguards

4.53 Section 51 of the Ordinance provided guidance as to the weight to be accorded to hearsay evidence. The court was required to have regard to all the circumstances from which an inference can reasonably be drawn, 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 (or, for records, the first supplier of the information or other person concerned with compiling and keeping the records) had an incentive to conceal or misrepresent the facts.⁸² Section 52 of the *Evidence Ordinance* permitted evidence impeaching credibility of the witness, including prior inconsistent statements, even if such statements are themselves hearsay.⁸³ A further safeguard

⁸⁰ A review of practice showed that parties rarely fully complied with the rules. See Law Reform Commission of Hong Kong *Report on Hearsay Rule in Civil Proceedings* (1996) at para 2.6 – 2.7.

⁸¹ [1971] 1 WLR 623.

⁸² Law Reform Commission of Hong Kong *Report on Hearsay Rule in Civil Proceedings* (1996) at para. 1.22.

⁸³ *Ibid* at para. 1.21.

protected vexatious or mischievous attempts to needless challenges to the adducing of hearsay evidence may be penalised in costs. The court had a discretion to disallow or award costs against a party who unreasonably insisted by way of a counter-notice on the attendance of a witness who is the maker of a statement that is admissible as a hearsay statement.⁸⁴

(iv) Recommendations of the Hong Kong Law Reform Commission

4.54 In its 1996 Report the Hong Kong Law Reform Commission shared the view of the English Law Commission in adopting the following guiding principles:

- The law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence.
- As a general rule all evidence should be admissible unless there is good reason for it to be treated as inadmissible.⁸⁵

4.55 The Commission recommended that the hearsay rule be abolished instead of refining Part IV of the Evidence Ordinance. It recommended that there should be general admissibility of hearsay evidence in civil proceedings but that in order to avoid possible abuses, the general relaxation of the hearsay rule must be subject to proper safeguards. It further recommended the removal of the distinction between first-hand and multiple hearsay. The recommendations of the Commission were implemented in 1999 with the abolition of the hearsay rule in Hong Kong civil proceedings.⁸⁶

(d) Singapore

4.56 In its 2007 *Report on Reform of Admissibility of Hearsay Evidence in Civil Proceedings*⁸⁷ the Singapore Law Reform Committee noted that the law of hearsay as contained in the Singapore *Evidence Act 1997* had avoided many of the criticisms which were or have been levelled at the common law exceptions. From their inception, the statutory exceptions were generally intended and drafted to be wider than the common law exceptions.

⁸⁴ *Ibid* at para. 1.23.

⁸⁵ *Ibid.*

⁸⁶ Part IV of the Evidence Ordinance (Cap 8) as enacted by the *Evidence (Amendment) Ordinance 1999* (Ord. No. 2 of 1999).

⁸⁷ Singapore Law Reform Committee *Report of the Law Reform Committee on Reform of Admissibility of Hearsay Evidence in Civil Proceedings* (May 2007) at 5.

Nonetheless, the Law Reform Committee was of the view that the statutory exceptions were too narrow in relation to civil proceedings.⁸⁸

4.57 The Law Reform Committee noted that the Singapore *Evidence Act 1997* introduced a different conception of hearsay from the common law⁸⁹ but that the courts had largely relied on the common law notion of hearsay. It stated that this importation of the common law did not pose a major problem since normally the same results are obtained; the *Evidence Act 1997* did not formulate the rule against hearsay evidence, rather it adopted an inclusionary rule as to what may be admitted in evidence.⁹⁰

4.58 The Law Reform Committee carried out a comprehensive study of the reform options available and concluded:

“[W]e believe that abolition with safeguards should result in a more even-keeled trial process, especially in international disputes, and increase the attractiveness of Singapore as a forum for adjudication of international civil disputes”.⁹¹

4.59 The safeguards it recommended were a simplified notice procedure; the power to call a witness and in admitting computer-generated evidence there must be proof of the reliability of the computer when it generated the evidence.

(e) South Africa

4.60 In South Africa the *Law of Evidence Amendment Act 1988* provides a declarant-oriented definition of hearsay as well as more flexible criteria for admissibility that allow relevant evidence to be admitted. The effect of the 1988 Act is that the court has discretion to admit or exclude hearsay in contested cases where the maker of the statement does not testify.

4.61 The 1988 Act provides that hearsay shall not be admitted in civil or criminal proceedings except in three scenarios as provided by section 3(1) of the Act. Section 3(1) of the 1988 Act provides:

“(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

⁸⁸ *Ibid.*

⁸⁹ Sections 17 to 44.

⁹⁰ *Op cit* n. 63.

⁹¹ Singapore Law Reform Committee *Report of the Law Reform Committee on Reform of Admissibility of Hearsay Evidence in Civil Proceedings* (May 2007) at 26.

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to-
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.”

4.62 The 1988 Act renders the common law exceptions obsolete as section 3(1) makes it clear that statutory exceptions and the exceptions created by subsections (a), (b) and (c) above are ‘alternative avenues to admissibility.’⁹² Despite the statutory exceptions the common law exceptions remain relevant and inform the courts in determining whether it is in the interests of justice to admit hearsay evidence. The opening words of the section are intended to abridge common law exceptions while preserving other specialised statutory provisions on hearsay. In *S v Mpofo*⁹³ the court stressed that in terms of the definition of hearsay contained in the section, the statement of a passer-by must be regarded as hearsay whether or not at common law a statement which is part of the *res gestae* is regarded as being hearsay or not. In *Randfontein Transitional Local Council v Absa Bank Ltd*⁹⁴ the court seems to have proceeded in two steps, first determining admissibility according to the common law and then admissibility under section 3 of the 1988 Act.

4.63 Section 3 of the 1988 Act shifted the emphasis of admission of hearsay evidence to one of relevance based on the weight of the evidence and

⁹² Zeffertt *The South African Law of Evidence* (2003) 382.

⁹³ 1993 (3) SA 864 (N).

⁹⁴ 2000 (2) SA 1040 (W).

the section has inherent safeguards that the court takes cognisance of before admitting same. These safeguards include having a duty to exclude hearsay evidence and not passively admitting it in the absence of an objection from the parties; a duty to properly explain the significance and contents of section 3 to an unrepresented accused and protect the accused from 'the late or unheralded admission of hearsay evidence'.

4.64 In discussing the effect of section 3, a leading textbook states that it is clear that the intention of the legislature that the section is to be seen as an alternative route to admissibility where the evidence tendered under a statutory exception fails to meet the statutory requirements for admissibility. The text also states that the retention of the statutory exceptions is grounded on "convenience and utility" and the premise of the 1988 Act remains that "if it is in the interests of justice to receive an item of hearsay evidence it makes little sense to exclude it through a slavish adherence to the more artificial canons of statutory interpretation".⁹⁵

4.65 Despite the apparent advance in making the hearsay rule more utilitarian, moving away from the unwieldy common law position could create constitutional difficulties in South Africa, as in Ireland. The Constitution of South Africa specifically allows for the right to challenge evidence as being necessitated for a fair trial. This right expressly only relates to criminal trials but the South African Law Reform Commission (SALRC) in its 2008 *Discussion Paper on Evidence*,⁹⁶ suggested that it can be argued that the right to challenge evidence in civil trials could be read into the right to a fair public hearing specified in section 34 of the Constitution as the dangers inherent to the rule arise in both types of proceedings. Despite this concern, the SALRC concluded that if the constitutionality of this were to be challenged, the courts in South Africa would apply separate thresholds for civil and criminal trials:

"[T]he role the hearsay rule plays as a constraint on government power is far more dominant in the criminal than civil context. Unlike the civil courts the criminal justice system is a direct expression of the exercise of state power and it is in the criminal context that there is more likely to be a significant disparity in the resources of the parties. Consequently, the constitutional threshold for determining whether the right to challenge evidence has been met is likely to be substantially lower in civil proceedings than in criminal proceedings."

⁹⁵ Zeffertt et al. *The South African Law of Evidence* (2003) 382.

⁹⁶ *Review of the Law of Evidence (Hearsay and Relevance)* Discussion Paper 113 Project 126 (2008).

4.66 In *S v Ndhlovu*⁹⁷ the Supreme Court of Appeal considered whether cross-examination of the hearsay declarant was an indispensable component of the right to challenge evidence. The court held that whilst the unregulated admission of hearsay evidence might infringe the right to challenge evidence, section 3 of the 1988 Act, which is primarily an exclusionary rule, provides legislative criteria which protect against any infringement of the right to challenge evidence. The court said that the right did not extend to an obligation that all evidence can be challenged by cross examination, rather the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The court was also of the view that where the interest of justice favoured the admission of the hearsay evidence above its exclusion, no constitutional right was infringed. Another important consideration identified by the Supreme Court of Appeal was that the decision to admit hearsay evidence was one of law and not of discretion.

4.67 In examining the constitutionality of admitting hearsay evidence in civil cases, the SALRC considered the analogous confrontation clause in the Sixth Amendment of the United States Constitution, in respect of which it was noted that: “[t]he Supreme Court has never held that the Constitution constrains the admission of hearsay testimony in civil actions.” Consequently, it concluded that it was possible to argue that there was no constitutional bar in South Africa to abolishing the hearsay rule in civil cases, subject to the constraints of the due process clause which requires fairness.

(f) New Zealand

4.68 In 1988 the New Zealand Law Commission published a *Report on the Hearsay Rule* which was ultimately incorporated into the *Evidence Act 2006*. The 2006 Act, which was based on the New Zealand Commission’s *Code on Evidence*,⁹⁸ drew together the common law and statutory rules of evidence that had previously existed in New Zealand into one comprehensive code, with the intention of making the law of evidence as clear, simple, and accessible as possible.⁹⁹ Prior to 2006, the principal statutory exceptions to the hearsay rule were found in the *Evidence Amendment Act (No 2) 1980*, which preserved hearsay exceptions under the common law and other statutory exceptions and had applied in both civil and criminal proceedings.

⁹⁷ 2002 (2) SACR 325 (SCA) at [16].

⁹⁸ New Zealand Law Commission *Evidence Code and Commentary Report* 55-Volume 2.

⁹⁹ Williams “Hearsay and spouses: a prosecutor’s perspective” *NZ Lawyer online* 25 May 2007 available at <http://www.nzlawyeromagazine.co.nz/Archives/Issue65/F2/tabid/441/Default.aspx>.

4.69 In its 1988 *Report on the Hearsay Rule* the New Zealand Law Commission recommended that in civil cases the hearsay rule should effectively be abolished subject to a general power to exclude evidence that is prejudicial, confusing, misleading or time-wasting. It also proposed a number of procedural safeguards, so that whenever a hearsay statement is offered in evidence other parties should be able to require an available declarant to be called. As a result, the hearsay statement would be excluded if the party offering it declines to call the declarant (unless the court finds the attendance of the declarant need not be required). It also recommended that a party should, with the leave of the court, be allowed to call or recall witnesses in relation to the hearsay evidence which is admitted. The change in the law as regards the hearsay rule stemmed from a later consideration of the rule in the Commission's *Evidence Code*.

4.70 The New Zealand Law Commission stressed that "the emphasis the [Evidence] Code places on facilitating the admission of relevant and reliable evidence cannot be overstated."¹⁰⁰ The *Code on Evidence*¹⁰¹ as proposed by the New Zealand Law Commission would retain the hearsay rule as primarily an exclusionary rule. The overall purpose of the hearsay provisions in the Code and the subsequent 2006 Act is to simplify and rationalise the law in civil as well as in criminal proceedings. Hearsay evidence is exceptionally admissible in both civil and criminal proceedings but a distinction is made between the admissibility requirements. In civil proceedings hearsay is admissible provided there are indicia of reliability, the maker of the statement is unavailable as a witness or requiring the maker of the statement to be a witness would cause undue delay or expense. There are a number of factors to be considered in deciding whether there is reasonable assurance that a hearsay statement is reliable in terms of section 18 which pertains to hearsay in civil cases. These factors may in part overlap in considering admissibility of hearsay evidence in criminal trials under section 19. In both civil and criminal proceedings, hearsay may be admitted by consent under section 9.

4.71 Section 9(1) of the proposed Code provides:

"(1) In any proceeding, the judge may

(a) with the consent of all parties, admit evidence that is not otherwise admissible; and

(b) admit evidence offered in any form or way agreed by all parties."

¹⁰⁰ NZLC Evidence R 55, vol. 1, 8.

¹⁰¹ New Zealand Law Commission *Evidence Code and Commentary Report 55*-Volume 2.

4.72 The New Zealand Law Commission in its commentary said that the purpose of section 9(1)(a) is to codify the convenient practice in both civil and criminal proceedings which allows a judge, with the consent of all parties, to admit evidence that may otherwise not be admissible. It noted that it is common practice for parties to sometimes introduce evidence that is not strictly relevant to the determination of the proceedings, without objection from the other party or parties and to allow this expressly would save court time and avoid constant rulings on admissibility.¹⁰²

4.73 Section 18 of the Code deals with hearsay in civil proceedings and provides:

“In a civil proceeding, hearsay is admissible if the circumstances relating to the hearsay statement provide reasonable assurance that the statement is reliable and

(a) the maker of the statement is unavailable as a witness; or

(b) requiring the maker of the statement to be a witness would cause undue delay or expense.”

4.74 In its commentary on section 18, the New Zealand Law Commission said that the effect of the section is that two conditions must be satisfied before a hearsay statement is admissible as evidence. First the judge must be satisfied that the circumstances in which the statement was made were such that it ought to be reliable. Second, either there must be proof that the maker of the hearsay statement is unavailable as a witness, or the expense or delay involved in calling the maker of the statement as a witness is not warranted. The Commission illustrates this by an example of a party that intends to prove a minor issue about which there is unlikely to be any real doubt.¹⁰³ If the conditions for admissibility are not met, the party wanting to offer the hearsay must either call the maker of the statement as a witness to give that evidence, or do without the hearsay.

4.75 The New Zealand Law Commission was of the opinion in its Report that notice would be given on a voluntary basis in relation to significant hearsay in civil proceedings, in order to give other parties sufficient time to consider whether to give consent. In its Report it expected that notice will come to be routinely given – for example, as part of the process of exchanging briefs of evidence before trial – so that cases can be heard efficiently and without

¹⁰² New Zealand Law Commission *Evidence Code and Commentary Report* 55-Volume 2 at C62.

¹⁰³ New Zealand Law Commission *Evidence Code and Commentary Report* 55-Volume 2 at C62.

unnecessary delays. Costs sanctions might follow if the proceedings have to be adjourned (for example, to allow rebuttal evidence to be called) or abandoned.¹⁰⁴

4.76 The 2006 Act provides suitable safeguards for the admission of hearsay evidence, but the courts in New Zealand continue to follow the trend of resting their determination of admissibility on relevance and reliability. Both of these concepts necessitate a large injection of judicial discretion to determine their scope and this creates uncertainty as the determination of relevance and reliability must proceed on a case by case basis.

4.77 In order to establish that a statement is reliable, regard must be had to the circumstances in which it was made. These are set out in section 16(1). Williams describes section 16(1) as providing no more than a framework; reference may be had to common law examples to help establish “reliability”.¹⁰⁵ Missing from this list of circumstances is the veracity of the witness who will be relaying the statement to the court.¹⁰⁶

4.78 In *R v S&H*¹⁰⁷ the New Zealand Court of Appeal expressed reservations as to whether it is appropriate to segment the reliability analysis in this way. In *R v Manase*¹⁰⁸, the Court referred to “sufficient apparent reliability” being required at the admissibility stage, and similarly the Act requires a “reasonable assurance” of reliability, indicating that the judge acts as the gatekeeper in deciding whether or not the evidence is admissible. The segmentation that troubled the Court of Appeal in *R v S & H*,¹⁰⁹ in fact reflects the reality that the section 18 test is merely a gate through which a statement must pass before the trier of fact decides how reliable the statement is, and how reliable the witness is, and, therefore, how much weight to give the witness’s statement.

¹⁰⁴ New Zealand Law Commission *Evidence Code and Commentary* Report 55-Volume 2 at C86.

¹⁰⁵ Williams “Hearsay and spouses: a prosecutor’s perspective” *NZ Lawyer online* 25 May 2007 available at <http://www.nzlawyer magazine.co.nz/Archives/Issue65/F2/tabid/441/Default.aspx>

¹⁰⁶ *Ibid.*

¹⁰⁷ [2007] NZCA 37.

¹⁰⁸ [2001] 2 NZLR 197

¹⁰⁹ [2007] NZCA 37.

(g) Australia

4.79 Until the enactment of the *Evidence Act 1995*, the rules of evidence in Australia were largely formulated from the common law. The first step towards reform came in 1979 when the federal Government gave the Australian Law Reform Commission (ALRC) the task of inquiring into the possibility of a comprehensive rationalisation and reform of the law of evidence.

4.80 The ALRC's comprehensive review of the law of evidence in both civil and criminal matters led to an interim report in 1985, a final report in 1987¹¹⁰, and culminated in the enactment of the *Evidence Act 1995 (Cth)*. The 1995 Act applies in all federal courts, and New South Wales has adopted similar laws of evidence. The *Evidence Act 1995 (Cth)* reformed the common law position relating to hearsay. While hearsay remains excluded generally, the rule is substantially relaxed and the exceptions to it rationalised. The 1995 Act sets out an exclusionary system of relevancy based on the principle that all logically relevant evidence is admissible unless excluded by rules of exclusion. Unintended 'implied assertions' are no longer excluded by the hearsay rule. Section 55(1) of the 1995 Act states that "[t]he evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding". Sections 56(1) and 56(2) state that "[e]xcept as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding" and that "[e]vidence that is not relevant in the proceeding is not admissible" respectively. The statutory concept of relevance enacted by the Act can "fairly be equated with the common law concept".¹¹¹ Another important rule of exclusion is contained in section 135 of the 1995 Act which gives a general power to the court to exclude evidence more prejudicial than probative. The powers given by section 136 and section 137 are noteworthy since they extend the common law in important respects by empowering the court to act on a case-by-case basis to safeguard against what may be specific and identifiable prejudicial effects of any hearsay evidence that is admitted under the Act. In *Papakosmas v R*¹¹², McHugh J. said that "sections 135, 136 and 137 contain powers which are to be applied on a case by case basis because of considerations peculiar to the evidence in the particular case".¹¹³

¹¹⁰ *Interim Report: Evidence* (Report No. 26, 1985); *Final Report: Evidence* (Report No. 38, 1987).

¹¹¹ Gaudron and Kirby JJ in *Papakosmas v R* (1999) 196 CLR 297 at 312.

¹¹² (1999) 196 CLR 297.

¹¹³ *Ibid* at 327.

4.81 The *Evidence Act 1995* has the advantages of codification and greater uniformity. Appropriate distinctions are drawn between first and more remote hearsay and between civil and criminal proceedings. In civil trials where the maker of the hearsay statement is unavailable, first-hand hearsay is admissible provided prior notice is given. If the maker is available, hearsay is admissible provided it was made when the facts represented were fresh in the maker's memory. Hearsay is admissible in these circumstances even without calling the maker if to do so would involve undue delay or expense. With respect to multiple hearsay, no distinction is made between civil and criminal proceedings and specific categories such as government and commercial records, reputation as to family relationships and public rights, telecommunications, commercial labels and tags are admissible in evidence on grounds of reliability or necessity or both.

4.82 Necessary safeguards are provided for in the form of discretions; warnings; provisions requiring notice to be given to the other party; extension of discovery rules; power to direct witnesses be called and documents be produced; and admissibility of evidence relating to credibility of maker. A *Review of the Criminal and Civil Justice System Evidence Act 1995* notes that the Act is drafted in light of an overriding policy framework which focused on reducing delay and cost; it acknowledges and seeks to benefit from advances in technology and it seeks to reduce surprise in litigation by providing for the giving of notice to opposing parties in various circumstances.¹¹⁴

E Reform Options

(1) Why introduce hearsay in civil cases?

4.83 In civil proceedings there may well be mechanisms for guarding against surprise at trial as a result of the admission of hearsay evidence. It has been suggested that in civil trials it may be more appropriate to use notice requirements and costs incentives to guard against the introduction of derivative information that is hearsay, while it is acknowledged that similar mechanisms are not found and would be more difficult to introduce in criminal trials. The requirement of prior notification prevents the other party from being taken by surprise and saves the party attempting to adduce evidence from unnecessary cost. The Law Reform Commission of Hong Kong suggested that this notice procedure is merited because it saves time in the challenge process¹¹⁵ and

¹¹⁴ *Review of the Criminal and Civil Justice System* at 3. Available at <http://www.lrc.justice.wa.gov.au/2publications/reports/P92CJS/finalreport/ch20evidence.pdf>.

¹¹⁵ Law Reform Commission of Hong Kong *Report on Hearsay Rule in Civil Proceedings* (1996) at para 3.3.

although notices may be served out of time, or possibly be defective they do at least promote the objects of avoiding surprise and unnecessary cost.¹¹⁶

4.84 Shifting the emphasis from admissibility to weight undermines the crucial rule that the decision to admit hearsay evidence is one of law and not of discretion. The weight of evidence is something traditionally determined by the jury or fact finder and therefore is considered a question of fact rather than law. The question then turns to whether allowing evidence to be admitted in civil cases could be a justifiable limitation on any constitutional right. The hearsay rule in respect of civil trials is not concerned with protecting the individual from the abuse of state power and has been greatly diminished in a number of democratic, adversarial jurisdictions.

4.85 The general trend in other common law jurisdictions is to permit hearsay evidence being admitted on a weight basis, with the twin strands of relevance and reliability being considered by the courts. The Commission considers that shifting the focus to the weight of the evidence could arguably pave the way for divisive standards to emerge in assessing the weight of evidence. It is arguably preferable that the decision to admit hearsay evidence is one of law and not of discretion, whatever its guise. Further, allowing the weight of evidence to be assessed prior to the trial of fact encroaches upon the fundamental precept that the weight of evidence is to be determined by the fact finder (either judge or jury) in the course of the trial. Removing this traditional rule raises the danger that will lead to the diminution of the safeguarded procedures necessary for a fair trial whether in the civil or criminal courts.

(2) Consultation with practitioners on reform of the hearsay rule in civil proceedings

4.86 The Commission held a roundtable discussion with practitioners and commentators to discuss the need for reform of the hearsay rule in civil proceedings. The views expressed were that there was no objection in principle to allowing hearsay to be admitted in civil proceedings and the key issue is the weight that the court should attach to hearsay evidence. It was noted that, in general, judges do not have regard to hearsay statements unless they can be tested. A number of participants expressed concern about a jury evaluating hearsay evidence and attaching the correct weight to it. They suggested that there ought to be a distinction between non-jury and jury civil trials.

4.87 In relation to the suggested requirement for notice requirements, some practitioners were of the opinion that case management is often not practically feasible and a degree of flexibility should be allowed in relation to this requirement.

¹¹⁶ *Ibid.*

4.88 The consensus was that in civil proceedings hearsay may be admitted, subject to judicial discretion both to exclude the evidence and to decide the weight to be accorded to the evidence. It was suggested that first the court should consider the reason why direct evidence is not being offered before accepting the hearsay.

4.89 The Commission now turns to set out three potential reform options in this respect.

(3) *Maintain the current position on the hearsay rule but clarify by legislation*

4.90 Although many other common law jurisdictions have moved towards an inclusionary approach, one possible option is that the existing common law inclusionary exceptions and the existing statutory provisions, discussed in Chapter 3, could be placed on a statutory footing. This would clarify the situations where hearsay evidence may be admitted in civil proceedings and they would be included in a single Act for ease of reference. In essence this option would be a ‘tidying up’ exercise and would not tamper with the possibility that the rule may be further developed judicially.

4.91 The Commission does not consider that this approach would be effective to deal with the inadequacies of the rule in civil proceedings. The Commission also notes that such an approach would not even reflect current practice, and also notes the inclusion of hearsay in civil trials is in line with the approach adopted in other jurisdictions.

(4) *Wide Judicial Discretion to admit hearsay evidence*

4.92 This approach had been examined by the Australian Law Reform Commission (ALRC)¹¹⁷ and judicial discretion to admit is in operation in South Africa. Under this approach, judges would be permitted to admit hearsay evidence after considering certain conditions of a general character. The exclusionary rule would be maintained and in place of numerous specific exceptions at common law, the court would be authorised to admit hearsay evidence once the indicia of reliability, probity and fairness were met. In addition the admission of the evidence had to be in the interests of justice, a test which requires a number of denominators to be achieved.¹¹⁸

4.93 While such an approach would also avoid detailed categorisation of exceptions to the rule and may proceed on a principled basis, the categorisation and consideration of principles mentioned by the ALRC may prove contentious.

¹¹⁷ Australian Law Reform Commission, *Evidence Reference, Research Paper 9: Hearsay Law Reform - Which Approach?* (1982), paras 20-25.

¹¹⁸ *Ibid.*

How would judges exercise their discretion in determining the new standards to be met in the absence of statutory guidance or otherwise? Would uniformity prevail in an area of evidence that necessitates certainty? Would the exercise of wide judicial discretion simply provide a cloak for the original rule to develop unchecked? At this point, while the courts in Australia and to a larger extent in Canada, have favoured this route, the lack of certainty emanating from such an approach has clearly not found favour with Irish courts.

4.94 The lack of certainty in the law which is likely to arise would not promote confidence in practice: parties would have to have available all witnesses who might need to be called which would inhibit pre-trial settlements and lead to delays and extra costs; courts would be swamped by evidence of marginal probative value; there would be potential for delay and frequent interruption of trials and the deliberate creation of evidence may emerge as a feature of proceedings.¹¹⁹

4.95 The Commission does not consider that this approach adequately addresses the need for reform of the hearsay rule in civil cases. The Commission acknowledges, however, that there is a need to maintain the judicial discretion to exclude hearsay in the interests of the fairness of the proceedings.

(5) Admission of hearsay evidence in civil proceedings subject to safeguards

4.96 This was the option favoured by the Scottish Law Commission¹²⁰, the English Law Commission, the Hong Kong Law Reform Commission¹²¹ and the New Zealand Law Commission, and this Commission also considers that it is the preferable option for reform. There are two fundamental reasons for abolishing the hearsay rule in civil cases: that all germane evidence would be admissible at trial and the rules of evidence would become more straightforward in practice for lawyers, the courts and litigants alike. This would have the further effect that the hearsay rule would cease to afford a ground of appeal as of right. This mode of reform would also reflect existing practice where parties often waive their right to oppose hearsay. It removes the drawback of affording a tactical ground to object to the evidence in the course of trial. It might be argued that existing practice has served as *de facto* reform and removes much of the

¹¹⁹ Law Reform Commission of Hong Kong *Report on Hearsay Rule in Civil Proceedings* (1996) at para. 4.15.

¹²⁰ Scottish Law Commission, *Evidence: Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* (Report No 100, 1986).

¹²¹ Law Reform Commission of Hong Kong *Report on Hearsay Rule in Civil Proceedings* (1996)

pressure for reform of the hearsay rule in civil proceedings, but as has been noted elsewhere: “[i]t is a method of reform... that carries with it grave dangers [because]... the rules lie in wait for any practitioner to use when it is to his client’s tactical advantage.”¹²²

4.97 In England the Law Commission noted that it is partly the impossibility of simplifying the rule (because of the need to classify the nature of the hearsay evidence and to analyse the combination of forms of hearsay which are often combined in one statement) which generates calls for its abolition.¹²³

4.98 There is the secondary argument that reform using this model reflects the common sense judgement that no party would be willing to put forward hearsay evidence if better direct evidence were available and that this consideration would in practice ensure that the abolition of the rule would not be abused. The English Commission was of the view that the weakness of the hearsay rule cannot be remedied just by way of clearer explanation. It is not justifiable to exclude relevant evidence solely because of its hearsay nature and the interests of justice may be better served by providing the court with all the relevant information necessary to make an informed choice.¹²⁴ In 1978 the Law Reform Commission of New South Wales in its *Report on Hearsay Evidence* stated that when considering the merits of abolition as a possible reform:

“Everyone is accustomed to having hearsay information when making day-to-day decisions, some of great importance, in his private or business affairs and everyone is accustomed to assessing the reliability of such information... No sensible litigant and certainly no competent advocate, would call weak evidence if stronger evidence were available, or expose his case to ridicule by multiplying valueless hearsay repetitions of a statement”.¹²⁵

4.99 In adopting the approach of abolishing the exclusionary rule, the Law Commission also had regard to the fact that there are many tribunals where the rule against hearsay, amongst other rules of evidence, does not

¹²² Australia Law Reform Commission, *Interim Report: Evidence* vol 1 (Report No 26, 1985) at p 122; cf Singapore Law Reform Committee *Report of the Law Reform Committee on Reform of Admissibility of Hearsay Evidence in Civil Proceedings* (May 2007) at 27.

¹²³ Law Commission Consultation Paper *The Hearsay Rule in Civil Proceedings* (No. 117-1990) at 90-91.

¹²⁴ Law Commission Report *The Hearsay Rule in Civil Proceedings* (1993) (Law Com No. 216) at para 5.4.

¹²⁵ Report No. 29 para 1.3.3.

apply and the consultation process did not reveal any general dissatisfaction with the quality of decision making or fairness to the parties. The Commission noted the view expressed by Balcombe LJ that “the modern tendency in civil proceedings is to admit all relevant evidence and the judge should be trusted to give only proper weight to evidence which is not best evidence.”¹²⁶ In conclusion therefore the Law Commission was of the view that hearsay evidence can be excluded if it is irrelevant or superfluous but that the fact that it is hearsay should no longer be a ground for making it *prima facie* inadmissible.¹²⁷

4.100 There are, of course, dangers associated with the abolition of the hearsay rule in its entirety. First, hearsay is not the best evidence of the fact; there are a number of dangers associated with the evidence which led to the rule originating as a rule of evidence. The argument runs that convenience and administrative practicalities must not make way for the abrogation of a rule, which even within the confines of civil proceedings balances the interests of justice and the fairness of the trial. A second argument against removal of the rule is that its abolition leads to the reinvention of the rule under another guise. In its 1978 *Report on the Rule Against Hearsay* the Law Reform Commission of New South Wales was cautious about recommending the abolition of the rule:

“Our caution is motivated as much by the fear that such a drastic reform would be ineffective in practice, as by concern about the risks traditionally urged in opposition to hearsay evidence...Attempts at wide-ranging reform which leave the courts without precise directions may only result in old rules and practices reappearing in a new guise. If the law gave no guidance on when hearsay evidence should be received or acted on, judges...who are conditioned to reject or scorn it would probably develop new rules and practices to protect the courts against an apprehended flood of valueless evidence....many old rules and attitudes might well surface as guides to the exercise of discretion. If there were no discretion to reject, the arguments would be transferred to issues either of relevance or of weight, and again the apparently simple reform might turn out not to be as sweeping or as practicable as had been anticipated”.¹²⁸

¹²⁶ *Ventouris v. Mountain (No. 2)* [1992] 1 WLR 887,899.

¹²⁷ Law Commission Report *The Hearsay Rule in Civil Proceedings* (1993) (Law Com No. 216) at 24.

¹²⁸ Report No. 29, paragraph 1.3.3.

(a) Notification requirement

4.101 The Hong Kong Law Reform Commission pointed out that the constantly revised set of exceptions would continue to provide detailed guidance to the judges in dealing with hearsay evidence.¹²⁹ This option, however, would increase the complexity of the hearsay rule. It would result in a lengthy list of overlapping exceptions which is developed merely to meet particular difficulties and discloses no consistency in approach. The English Law Commission considered refinement of the rule through the introduction of notice procedures to inform the other party of the intention to adduce hearsay evidence. As parties in Ireland often waive their rights to object to the introduction of hearsay evidence and practice has been largely the adoption of an informal approach to the rule, such a recommendation for reform would preserve the exclusionary nature of the hearsay rule (with an overriding duty to exclude hearsay evidence in certain instances) while allowing parties to civil proceedings a level of flexibility to introduce hearsay evidence in certain circumstances. It is suggested that a notification procedure¹³⁰, would contain the following elements:

- The duty that the notice to be given should simply state the nature of the hearsay evidence to be adduced. This duty to notify the other side would encompass the giving of particulars as specified by statute or the court.
- If the party against whom the evidence is to be adduced requests further particulars, these must be given where it would be reasonable and practicable to do so.
- If the party against whom evidence is to be adduced objects to the use of such evidence, there should be a duty on that party to notify the other side of the intention to oppose the use of hearsay evidence, giving particulars.

¹²⁹ Law Reform Commission of Hong Kong *Report on Hearsay Rule in Civil Proceedings* (1996) at para. 4.6.

¹³⁰ It is, however, the experience of legal professional bodies in other jurisdictions that notice requirements are unnecessarily complex and outdated, wasteful of resources, time consuming to observe and unnecessarily inconvenient to comply with. See for example the views on Consultation expressed by Law Society and Bar Association to the Law Reform Commission of Hong Kong in its *Report on Hearsay Rule in Civil Proceedings* (1996) at para. 4.16 – 4.21.

- In the case of oral hearsay, the power of the opposing party to require the attendance of the person to give direct evidence should be retained where his attendance is “reasonable and practicable”¹³¹.
- In some cases where the evidence would, without fault of either party, be inordinately difficult to procure, the notice may be dispensed with, subject to the discretion of the judge to exclude in the interests of justice.
- The party offering the evidence should be obliged to offer evidence of the maker’s credibility so far as this is possible.

4.102 If this reform option or a version of it were to be selected there may need to be a number of refinements to the hearsay rule¹³², including, for example: relaxation of the rules governing admissibility of business records; the need to provide for the admissibility of evidence generated entirely by computer or other sophisticated processes; provision for the admissibility of hearsay evidence of the absence of a record; statutory guidelines on weight of hearsay evidence; review of the existing categories of unavailability excusing the attendance of the maker of the hearsay statement and review of the rules relating to the use of hearsay in affidavits.

4.103 The Commission notes that, in allowing the admission of hearsay in civil cases it is preferable to invoke a notification procedure to identify where a party seeks to introduce hearsay and that hearsay should not be used where it is reasonable and practicable for the witness to attend. Considerations of reasonableness reflect such factors as the importance of the evidence to the facts in issue and the likely delay and cost of adducing direct evidence. This consideration must nonetheless be balanced against any reform which restricted the parties’ rights under the present law to adduce written documentation without having to call the maker who may be available.

¹³¹ The Law Reform Commission of Hong Kong suggests that the aims of such a notice procedure should be to ensure that hearsay statements are made known to the other parties “sufficiently in advance of the trial to provide the other party with a fair opportunity” to decide whether to require the maker to be called. With such aims in mind, the contents of the notice can be simplified. Law Reform Commission of Hong Kong *Report on Hearsay Rule in Civil Proceedings* (1996) at para. 4.9.

¹³² See Law Commission *The Hearsay Rule in Civil Proceedings*, Consultation Paper No. 117, paras 4.5 to 4.9.

(6) *Judicial discretion to evaluate weight to be attached to hearsay and to exclude hearsay*

4.104 In the Commission's view, reform of the hearsay rule in Ireland in civil proceedings should include a judicial discretion as to the weight to attach to the evidence and to exclude hearsay evidence for an array of reasons. One ground may be that the hearsay evidence is repetitive of facts of which there is other evidence or is otherwise of little probative value. The discretion to exclude might be applied where, for example, the hearsay statement was made by a person who is giving evidence at the trial and whose former statement adds nothing to that testimony. This power to exclude could extend to consideration of the admissibility of the previous statements of witnesses. Where the previous statement is consistent the discretion can be related to the desire to avoid the proliferation of evidence. Where the statements are inconsistent, the courts may be concerned with the abuse of the right to admit evidence to overcome the failure of the witness to come up to proof. The aim of this discretion to exclude unnecessary and dubious evidence would be to limit the length of proceedings, ensuring quality of evidence. An analogous provision on this point is Rule 403 of the US *Federal Rules of Evidence* which provides that evidence which is otherwise admissible may be excluded if: "its probative value is substantially outweighed by...consideration of undue delay, waste of time, or needless presentation of cumulative evidence".

4.105 Another situation where the judicial discretion may arise would be if it became apparent that the hearsay evidence in issue was made in the contemplation of litigation. This was a factor taken into account by the Scottish Law Commission in recommending that precognitions¹³³ should not be admissible.¹³⁴

(7) *Provisional recommendations for reform*

4.106 In summary, therefore, the Commission has provisionally concluded that it should continue to advocate reform along the inclusionary basis recommended in its 1988 *Report on the Rule Against Hearsay in Civil Cases*.¹³⁵

¹³³ Precognition in Scots law is the practice of taking a factual statement from a witness before a trial is enjoined. This is often undertaken by trainee lawyers or precognition officers employed by firms. Many of these are former police officers. This procedure is followed in both civil and criminal causes. While the subsequent statement is inadmissible in evidence of itself, it allows an advocate or solicitor in Scotland to appear before the courts of Scotland knowing what evidence each witness is likely to present.

¹³⁴ Scot. Law Com. No. 100 (1986) para 3.57.

¹³⁵ LRC 25-1988.

Taking into account discussion in this Chapter of the detailed elements of reforms put in place in other states since 1988, the Commission now turns to set out the specific recommendations for reform of the hearsay rule in civil cases.

4.107 *The Commission provisionally recommends that in civil proceedings evidence should not be excluded on the ground that it is hearsay.*

4.108 *The Commission provisionally recommends that in civil proceedings, hearsay is admissible where:*

(a) the maker of the statement is unavailable as a witness because he or she:

- Is dead*
- Is in ill health and is unable to testify*
- Cannot be identified or found*
- Is outside the jurisdiction and it is not possible to obtain his or her evidence,*

(b) requiring the maker of the statement to be a witness would cause undue delay or expense, and

(c) the court is satisfied that cross-examination of the witness is not necessary.

4.109 *The Commission provisionally recommends that no distinction should be drawn between first hand and multiple hearsay as it applies to civil proceedings.*

4.110 *The Commission invites submissions on whether the inclusion of hearsay evidence should extend to hearsay in rebuttal of testimony given on affirmation or oath which was tested by cross-examination.*

4.111 *The Commission provisionally recommends that a party intending to introduce hearsay as evidence in civil proceedings should provide advance notice of that intention to other parties.*

4.112 *The Commission provisionally recommends that when a party gives notice of its intention to adduce hearsay, it should state the nature of the hearsay evidence and that reasons must be stated in the notice as to why the party cannot call the maker of the hearsay statement.*

4.113 *The Commission provisionally recommends that if a party seeks to adduce hearsay the other party or parties may request further particulars of the evidence and that these should be given by the party seeking to adduce the hearsay where it is reasonable to do so.*

4.114 *The Commission provisionally recommends that if a party seeks to adduce hearsay, the other party or parties may apply to the court for leave to call the witness and examine him on his statement.*

4.115 *The Commission provisionally recommends that the party offering the evidence should be obliged to offer evidence of the maker's credibility so far as this is possible.*

4.116 *The Commission provisionally recommends that the advance notice requirement may be waived on the consent of the parties and in the discretion of the court where the other parties are not prejudiced by the failure to give notice.*

4.117 *The Commission provisionally recommends that the weight to be attached to hearsay is a matter for the court and that the court should retain a general discretion to exclude evidence that is prejudicial, confusing, misleading or time-wasting.*

CHAPTER 5 REFORM OF THE HEARSAY RULE IN CRIMINAL PROCEEDINGS

A Introduction

5.01 In this Chapter, the Commission discusses reform of the hearsay rule in criminal proceedings. The Commission has already noted that separate consideration of the hearsay rule in criminal cases is appropriate for a number of reasons.¹ The standard of proof in a criminal trial in Ireland requires the prosecution to prove beyond a reasonable doubt that the accused is guilty of an offence². This standard of proof demands that convictions should be sustained only on the basis of evidence of undoubted reliability. In addition, the potential removal of an individual's liberty is a reason to treat hearsay in criminal cases with caution. The fundamental reason for retaining its exclusionary strictness³ is that, if out of court statements made by persons who were not required to attend to give evidence were freely admissible in evidence, the path would be clear for those who wished to invent and fabricate evidence. The 2007 *Final Report of the Balance in the Criminal Law Review Group* noted that this potential would especially be true in criminal cases.⁴

5.02 In Part B, the Commission reviews how the rule against hearsay currently operates in criminal cases. In Part C, the Commission examines the reform of the hearsay rule in criminal cases in other States and considers whether any of these provide a model for reform in Ireland. In Part D, the Commission examines a number of specific issues that arise in the context of the application of the rule in criminal proceedings, including its use in sentencing hearings. In Part E, the Commission sets out its conclusions and provisional recommendations for reform of the hearsay rule in criminal cases.

¹ See the Introduction to this Consultation Paper, paragraph 10.

² Walsh *Criminal Procedure* (Thomson Round Hall, 2002) at 1.

³ Healy *Irish Laws of Evidence* (Thomson Round Hall 2004) paragraph 9-01.

⁴ *Balance in the Criminal Law Review Group: Final Report* (Department of Justice, Equality and Law Reform, 2007) at 229.

B Statutory amendments to the hearsay rule

5.03 In Ireland, mirroring its approach in the context of civil cases (discussed in Chapter 4, above), the Oireachtas has enacted a number of specific reforms of the hearsay rule in criminal proceedings, often where the rationale for its continued application has ceased,⁵ but has not enacted any comprehensive legislative reform of the rule. In this respect, the most notable change to the hearsay rule enacted by the Oireachtas is contained in Part II of the *Criminal Evidence Act 1992*, which created an exception for documentary information compiled or produced in the ordinary course of a business.

(1) Business records admissible under Part II of the Criminal Evidence Act 1992

5.04 Part II of the *Criminal Evidence Act 1992* created an inclusionary exception, in criminal proceedings only,⁶ allowing for the admission in evidence of documentary information produced or compiled in the ordinary course of a business. The 1992 Act mirrors the provisions enacted in the UK (originally enacted in the *Criminal Evidence Act 1965* and now contained in the *Criminal Justice Act 2003* and the equivalent in Part III of the *Criminal Justice (Evidence)(Northern Ireland) Order 2004*) to reverse the effect of the 3-2 majority decision of the UK House of Lords in *Myers v DPP*.⁷ The 1992 Act also implemented the recommendations made in this respect by the Commission in its 1987 *Report on Receiving Stolen Property*.⁸ The 1992 Act, reflecting the Commission's analysis – and indeed, the approach taken in virtually every country where this issue has arisen – acknowledges the reliability of statements and information recorded in documents where these have been compiled in the ordinary course of business and supplied by persons (admittedly, usually unidentified or unavailable to testify in court) who had personal knowledge of the matters. Records which are systematically kept, for example in business or government, are often reliable, even though the person who compiles them relies on information supplied by others. The 1992 Act makes it clear that, whatever the position was prior to 1992, such records are admissible, subject to certain conditions.

⁵ Healy *Irish Laws of Evidence* (Thomson Round Hall 2004) paragraph 9-59.

⁶ No similar statutory provision has been enacted in Ireland for civil proceedings.

⁷ [1965] AC 1001. See the discussion of the case at paragraph 2.19ff, above.

⁸ *Report on Receiving Stolen Property* (LRC 23-1987), paragraphs 29 (discussion of the law) and 144 (recommendation for reform).

5.05 While the 1992 Act undoubtedly “removed the shadow” of the decision in *Myers*⁹ it is also worth noting that, in its 1987 Report, the Commission doubted whether the actual outcome in the *Myers* case would have been followed in Ireland.¹⁰ The Commission pointed out that, while the core elements of the hearsay rule clearly applied in Ireland at that time (1987), the Irish courts had already appeared to suggest that the decision in *Myers v DPP*,¹¹ as opposed to the general principles it set out, would not have been followed. The Commission referred in this respect to the decision of the Court of Criminal Appeal in *The People (DPP) v Marley*,¹² in which the defendant had been charged with various forgery offences. The prosecution had relied, in part, on reconstructed cheque journals that had been damaged in a fire and been reconstructed by a person who was not available to give evidence because of illness. The trial judge had ruled the evidence admissible. On appeal, the Court of Criminal Appeal overturned this and quashed the defendant’s convictions on the counts relevant to these documents. In the course of its judgment the Court of Criminal Appeal stated:¹³

“The applicant relied in the course of his submissions on the decision of the House of Lords in *Myers v Director of Public Prosecutions* [1965] AC 1001. In that case, it was clear that no useful purpose would have been served by calling the various employees of the motor car company (even if they had been identifiable) who had filled in the various record cards since it was inconceivable that they could have any recollection of recording individual numbers. Nevertheless, the House of Lords held in that case that without such evidence the records were inadmissible as not falling within any of the established exceptions as to the rule against hearsay. By contrast, in the present case, it could hardly be said that no useful purpose would be served by calling Mr Butler, the identifiable and identified author of the disputed entries, who alone could give firsthand evidence of the manner and circumstances in which they were made. The court, accordingly, finds it unnecessary to express any opinion as to whether the *Myers* case should be followed in this country, having regard to the fact that the principle it lays down

⁹ Mr Justice Keane, Foreword to McGrath, *Evidence* (Thomson Round Hall 2005), at xvii.

¹⁰ *Report on Receiving Stolen Property* (LRC 23-1987), paragraph 29. Mr Justice Keane was, at the time, President of the Commission.

¹¹ [1965] AC 1001.

¹² [1985] ILRM 17.

¹³ *Ibid.*, at 24. The Court’s judgment was delivered by Keane J.

has not been applied in certain other common law jurisdictions (and has been reversed by statute in the United Kingdom: see *The Rule Against Hearsay*, [Irish] Law Reform Commission, Working Paper No. 9–1980 pp. 79–80).”

5.06 The Commission noted in its 1987 Report that, since the Court in *Marley* held that the failure to produce the relevant witness rendered the evidence inadmissible, the comments on the *Myers* case did not form an essential part of its decision and were not, therefore, binding on any subsequent Court. Nonetheless, the comments indicate that the view taken by the majority in *Myers* did not attract automatic acceptance in Ireland.

5.07 The Commission had also referred in the 1987 Report to the decision of the Court of Criminal Appeal in *The People (DPP) v Prunty*,¹⁴ in which the defendant had been charged with various offences, including false imprisonment. The prosecution relied in part on the evidence of telephone calls relating to the payment of a ransom. The prosecution contended that the defendant's voice had been identified from recordings made and the process of tracing those calls was also put in evidence. Objections were raised to the admissibility of this evidence on the ground that part of the proof of the tracing was established by hearsay evidence. The trial judge ruled that the evidence was admissible. As in the *Marley* case, the Court of Criminal Appeal overturned the view taken by the trial judge, but again without fully approving the decision in *Myers*. The Court stated:¹⁵

“Counsel for the Director of Public Prosecutions, in this Court, has not sought to contest that there was this element of hearsay but has asked this Court to adopt what might be termed the somewhat robust attitude taken by Lord Pearce and Lord Donovan, in the minority, in *Myers v Director of Public Prosecutions* [1965] AC 1001. It may be, as in the *Myers* case, where the essential witness cannot be obtained, the court should feel obliged to admit records, albeit hearsay, but there is no evidence that such is the case here. At first sight, in any event, it would seem that a means of proof analogous to that of the Bankers Books Evidence Act would require the intervention of the legislature.”

5.08 The decision in *Prunty*, while suggesting that the *Myers* case might be open to question in some instances, also indicated that it might be more appropriate to deal with the matter by way of legislation, along the lines of the *Bankers Books Evidence Act 1879*, as amended. On that basis, it is not perhaps surprising that the Commission concluded in its 1987 Report that

¹⁴ [1986] ILRM 716.

¹⁵ *Ibid.*, at 717-8. The Court's judgment was delivered by McCarthy J.

legislative action was now “urgently” required.¹⁶ As already indicated, Part II of the *Criminal Evidence Act 1992* implemented this recommendation. The Commission now turns to outline the provisions in Part II of the 1992 Act.

5.09 The definition of document in section 2 of the 1992 Act is technologically non-specific and open-ended.¹⁷ Part II allows for the admission of information in document form whether it is either compiled in the ordinary course of business or supplied by person A (whether or not that person is identifiable or is the compiler of the information in the document) to person B who may reasonably be supposed to have personal knowledge of the matters in question. The information may be supplied directly or indirectly.¹⁸ Sections 5 and 6 permit the introduction of information contained in documents which had been compiled in the ordinary course of business.¹⁹

5.10 It is an essential feature of the 1992 Act that for the information to be introduced in evidence it must have been compiled in the ordinary conduct of a business, not for the purposes of prosecuting the accused. Such information can have great probative force precisely because it was created prior to and independently of any allegation of criminality made against the accused.

5.11 The 1992 Act contains a number of safeguards against abuse of documentary hearsay. Under section 8 the court is given discretion to exclude the document “in the interests of justice”. Thus the court may have regard to the particular circumstances and may exclude a document from being admitted as evidence if it is satisfied that it is unreliable, inauthentic or to permit its inclusion would result in unfairness to the accused. Section 7 of the 1992 Act provides that advance notice is to be given of intention to tender the evidence and a copy of a document must be served to the accused at least 21 days before the trial commences; a certificate affirming that information was compiled in the ordinary

¹⁶ *Report on Receiving Stolen Property* (LRC 23-1987), paragraph 144.

¹⁷ Section 2(1) provides: “document” includes— (i) a map, plan, graph, drawing or photograph, or (ii) a reproduction in permanent legible form, by a computer or other means (including enlarging), of information in non-legible form.”

¹⁸ Section 5(2) provides that if the information was supplied indirectly it is only admissible “if each person (whether or not he is identifiable) through whom it was supplied received it in the ordinary course of a business.”

¹⁹ Section 4 provides: “‘business’ includes any trade, profession or other occupation carried on, for reward or otherwise, either within or outside the State and includes also the performance of functions by or on behalf of — (a) any person or body remunerated or financed wholly or partly out of moneys provided by the Oireachtas, (b) any institution of the European Communities, (c) any national or local authority in a jurisdiction outside the State, or (d) any international organisation.”

course of business is required prior to the trial pursuant to the conditions set out in section 6(1) of the *Criminal Procedure Act 1967*. Healy suggests that although the certificate and the advance notice of intention to tender documentary evidence under Part II of the 1992 Act appear to have been intended to function as prerequisites to admissibility under section 5 of the 1992 Act, it is implicit from the decision of the Court of Criminal Appeal in *People (DPP) v Byrne*²⁰ that Part II of the 1992 Act enables admissibility without these restrictions.²¹

5.12 Apart from the *Criminal Evidence Act 1992*, other statutory changes to abrogate the effect of the hearsay rule have tended to proceed on a piecemeal basis, with changes targeted at perceived procedural difficulties with the hearsay rule in specific instances rather than the softening of the hearsay rule being used to effect principled reform in criminal law procedure.

(2) Further statutory reform to the hearsay rule in criminal proceedings

5.13 Section 21 of the *Criminal Justice Act 1984* implemented a provisional recommendation of the Commission in its 1980 *Working Paper on the Rule Against Hearsay*,²² and provides for the admissibility - in criminal proceedings only - of statements as proof of the facts asserted in them, subject to the condition that this is not to occur where an objection is made within 21 days of receipt of notice of intention to tender the statement.

5.14 Section 27(1) of the *Criminal Evidence Act 1992* provides that the evidence of a person under 14 years of age may be received without the need for an oath or affirmation. The Commission has already noted that the absence of evidence under oath has been described as a foundation for the hearsay rule.

5.15 Section 6(1) of the *Criminal Justice (Miscellaneous Provisions) Act 1997* permits, at the first appearance of the accused at the District Court, admission of a certificate signed by the arresting or charging Garda not below the rank of sergeant to establish the fact of the arrest and charge. In addition section 6(2) of the 1997 Act provides that a certificate may be given in evidence to establish that the Garda who signed the certificate under section 6(1) commenced or remained on duty at the scene of the crime, that no person entered the place without his permission and no evidence was disturbed while

²⁰ [2001] 2 ILRM 134.

²¹ Healy *Irish Laws of Evidence* (Thomson Round Hall 2004) paragraph 9-38.

²² Law Reform Commission *Working Paper on The Rule Against Hearsay* (LRC WP 9 -1980).

the Garda remained on duty. However, section 6(1) and (2) are merely qualified exceptions to the hearsay rule since section 6(4) provides that the court may, if it considers that the interests of justice so require, direct that oral evidence of the matters stated in a certificate under this section be given.

5.16 Healy notes that, where a statutory suspension of the hearsay rule is likely to have a draconian effect for a party in the proceedings, the courts tend to interpret the provision restrictively. Thus, in *Criminal Assets Bureau v Hunt*²³ the Supreme Court considered the effect of sections 8(5) and 8(7) of the *Criminal Assets Bureau Act 1996*, which provides that a bureau officer may exercise or perform his or her powers or duties on foot of any information received by him or her from another bureau officer and provides that any information, documents or other material obtained by bureau officers shall be admitted in evidence in any subsequent proceedings. In the Supreme Court in *Hunt*, Keane CJ considered that the precise scope of the abridgement of the rule against hearsay effected by those provisions was difficult to identify. He concluded that the 1996 Act did not intend to waive the hearsay rule but rather the rule was relaxed where it was a necessary proof in proceedings, whether under the 1996 Act or other legislation. Thus, where a bureau officer takes certain actions as a result of information, documents or other material received from another bureau officer, the court may act on the sworn evidence of the bureau officer that he or she received the information, documents or other material from the other bureau officer.

5.17 Section 16 of the *Criminal Justice Act 2006* allows the admission in evidence of out-of court statements of witnesses where their evidence in court conflicts with statements made to the Gardaí, provided that certain conditions are met. Under section 16(1) of the 2006 Act the previous witness statement may be admitted, although the witness is not available for cross-examination if the witness:

- (a) refuses to give evidence,
- (b) denies making the statement, or
- (c) gives evidence that is materially inconsistent with it.

Section 16(2) of the 2006 Act provides that the statement may be admitted if:

- “(a) the witness confirms, or it is proved, that he or she made it, and
- (b) the court is satisfied—
 - (i) that direct oral evidence of the fact concerned would be admissible in the proceedings,

²³ [2003] 2 IR 168.

- (ii) that it was made voluntarily, and
 - (iii) that it is reliable²⁴, and
- (c) either—

(i) the statement was given on oath or affirmation or contains a statutory declaration by the witness to the effect that the statement is true to the best of his or her knowledge or belief, or

(ii) the court is otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth.”

5.18 Section 16 of the 2006 Act provides the Court with the discretion to exclude the evidence if there is a risk that its admission would be unfair to the accused or would not be in the interests of justice²⁵ or that its admission is unnecessary, having regard to other evidence given in the proceedings²⁶.

5.19 Section 50 of the *Criminal Justice Act 2007*, which introduced extended powers of Garda detention of up to 7 days (48 hours under Garda authority and a further 120 hours under judicial authority) for the “proper investigation” of specified offences (including murder and firearms offences), was amended by section 22 of the *Criminal Justice (Amendment) Act 2009*. Section 50(4C)(a) of the 2007 Act, as inserted by section 22 of the 2009 Act, provides that the officer of the Garda Síochána applying for an extension of time beyond the 48 hours (who must be a chief superintendent or higher rank) may give evidence of matters related to the application not within his or her personal knowledge but within the personal knowledge of another member. In other words, hearsay evidence may be given by the applicant officer. Section 50(4C)(b) of the 2007 Act, as inserted by the 2009 Act, provides that the District

²⁴ Section 16(3) of the 2006 Act provides that: “In deciding whether the statement is reliable the court shall have regard to—

(a) whether it was given on oath or affirmation or was videorecorded, or

(b) if paragraph (a) does not apply in relation to the statement, whether by reason of the circumstances in which it was made, there is other sufficient evidence in support of its reliability, and shall also have regard to—

(i) any explanation by the witness for refusing to give evidence or for giving evidence which is inconsistent with the statement, or

(ii) where the witness denies making the statement, any evidence given in relation to the denial.”

²⁵ Section 16(3)(4)(a) *Criminal Justice Act 2006*.

²⁶ Section 16(3)(4)(b) *Criminal Justice Act 2006*.

Court or Circuit Court hearing the application may, “if it considers it to be in the interests of justice to do so”, direct another member to attend to give direct oral evidence. Thus, while hearsay evidence may be given, it is also clear that section 50 of the 2007 Act, as amended by the 2009 Act, continues to assume that first-hand evidence should be made available where it is “in the interests of justice” to do so.

C Reform of the Hearsay Rule in Criminal Proceedings

5.20 In its 1980 *Working Paper on the Rule Against Hearsay*²⁷ the Commission noted that some difficulties might arise if the hearsay rule were to be retained in criminal cases while being relaxed in civil cases. For example, it would be anomalous if a person who was sued for fraud was found not liable in tort on the basis of hearsay evidence while being convicted in criminal proceedings for the same act because this evidence was excluded.²⁸

5.21 In the 1980 Working Paper the Commission in general refrained from making recommendations for the reform of the hearsay rule in criminal proceedings but commented that any reform of the law should be designed to ensure that all evidence which is logically probative is admissible.²⁹ It considered that the most simple solution would be to retain the present rule but to give the court a discretion to admit otherwise inadmissible hearsay evidence and noted that this approach was adopted to some extent in the United States *Federal Rules of Evidence* (1975).

5.22 As already mentioned in this Consultation Paper, the constitutional rights of confrontation and of cross-examination are key factors in the Commission’s reluctance to allow hearsay be admitted in a criminal trial. The danger of admitting hearsay evidence is that the trier of fact (in many cases the jury) may place undue weight on the hearsay, and there are also the risks associated with fabrication by a witness and of misunderstanding the out-of-court statement.

²⁷ LRC WP No.9-1980.

²⁸ The Commission stated: “In justice it is difficult to defend the exclusion of any logically probative evidence exculpating an accused. As regards evidence for the prosecution it may be argued that the public interest is not protected fully if any logically probative evidence is withheld. While it would seldom be appropriate to convict on the basis of hearsay evidence alone, such evidence might be valuable in corroborating the testimony of other witnesses”. *Working Paper on the Rule Against Hearsay* (WP No.9-1980) at 16.

²⁹ *Working Paper on the Rule Against Hearsay* (WP No.9-1980) at 17.

5.23 There is a growing trend towards limited reform of the hearsay rule in criminal cases, such as in Part II of the *Criminal Evidence Act 1992*, which specify situations where the rule will not apply. The Commission now turns to review the main models of reform relating to the hearsay rule in other jurisdictions.

(1) Option 1: Preserving the current application of the hearsay rule

5.24 This option involves retention of the hearsay rule in its current form. The Commission has considered whether the exclusionary hearsay rule should be narrowed by restricting the existing exceptions. The Commission considers that there are salient reasons for the existing statutory and common law exception and to restrict them would not serve the interests of parties in a criminal trial.

5.25 The Commission considers that retaining the current exclusionary hearsay rule in criminal proceedings is preferable to widening the rule. It notes that the rule against hearsay acts as a safeguard against the introduction of dubious and superfluous evidence. The Commission also notes that Article 38.1 of the Constitution of Ireland protects the right to cross-examination and that the free admissibility of hearsay evidence in criminal proceedings would infringe this constitutionally protected right. There are dangers associated with allowing evidence of unavailable witnesses: it undermines the defendant's right to a fair trial and creates the potential of miscarriages of justice arising if evidence adduced from the following categories of witnesses is admitted:

- Where the witness is dead (with the exception of dying declarations);
- Where a witness because of a bodily or mental infirmity cannot give evidence;
- Where the witness is outside of the jurisdiction;
- Where the witness cannot be found.

5.26 The Commission is of the view that certainty in the law should be of primary importance in the context of criminal cases. The existing exceptions to the hearsay rule are well established and there is enough certainty for parties presenting their case. The Commission considers that any change to the hearsay rule is thus best approached through judicial development should the need arise. The Commission does not see the need to set out statutory guidelines as to the factors to be considered by the court when addressing hearsay evidence.

(2) Option 2: Wide exceptions with a narrow discretion to admit

5.27 The reforms adopted in England in the *Criminal Justice Act 2003* were based on recommendations made by the English Law Commission in its

1997 *Report on Evidence in Criminal Proceedings: Hearsay and Related Topics*.³⁰ It recommended that the general rule against hearsay should be retained, subject to the specific exceptions with a limited inclusionary discretion to admit hearsay not falling within any other exception. Before turning to the 2003 Act, the Commission discusses the pre-2003 reforms of the hearsay rule in criminal cases.

5.28 In England and Wales, the significant series of statutory changes that effected liberalisation of the hearsay rule in the civil context (culminating in the *Civil Evidence Act 1995*) have not been replicated for criminal proceedings. The hearsay rule in England and Wales had been amended by the *Criminal Evidence Act 1965*, in direct response to the UK House of Lords decision in *Myers v. DPP*.³¹ Section 1 of the 1965 Act made certain trade and business records admissible. For the records to be admissible under the 1965 Act, they had to be compiled from information supplied by a person who had, or might reasonably be expected to have any recollection of the information supplied. There were a number of difficulties associated with section 1 of the 1965 Act, which arguably only went as far as to overcome the difficulties encountered in *Myers v. DPP*.³² The changes made to the hearsay rule by the 1965 Act were followed by section 68 of the *Police and Criminal Evidence Act 1984* (PACE) which extended the scope of this exception to the hearsay rule to records in the public sector. The *Criminal Justice Act 1988* broadened the admissibility of documentary hearsay in criminal cases to include any document. A witness statement could also be admitted on the grounds that the witness was not prepared to give evidence out of fear.³³ Zander states that the original aim of the 1984 Act, as placed before the UK Parliament, was to make such documentary evidence admissible without the need to establish strict conditions of admissibility.³⁴ The only real control was to allow the court discretion to exclude evidence where it would not be in the interests of justice to admit it. In the case of statements made during a criminal investigation or for the purposes of criminal proceedings, the proposed test was more stringent and would have

³⁰ Law Commission, *Report on Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997: No. 245).

³¹ [1965] AC 1001. The 1965 Act has since been replaced by the relevant provisions of the (UK) *Criminal Justice Act 2003*, as amended.

³² [1965] AC 1001. For a discussion of these pitfalls see Murphy "Hearsay: the road to reform" (1996-1997) 1 *Evidence and Proof* 107.

³³ Section 23(3) *Criminal Justice Act 1988*.

³⁴ Zander *The Police and Criminal Evidence Act 1984* (4th ed Thomson Sweet and Maxwell 2003) at 7-04.

required the leave of the court for the evidence to be admitted.³⁵ The liberal rules on admissibility proposed in the original Bill did not survive in the eventual text of the 1984 Act; vigorous parliamentary debates led to a number of extra tests and safeguards being added.³⁶

5.29 In 1994, the UK Royal Commission on Criminal Justice considered the law on hearsay to be “exceptionally complex and difficult to interpret”.³⁷ It suggested that the fact that a statement is hearsay should not mean that it is automatically inadmissible in the first place; rather that the court should attach less weight to it. It stated that the probative value of the evidence should in principle be decided by the jury and therefore hearsay evidence should be admitted to a greater extent.

5.30 In 1994, the Home Secretary requested the Law Commission to consider the law relating to hearsay in criminal proceedings. In 1997 the Law Commission published its Report³⁸ which set out recommendations to reform the hearsay rule. Arising from this 1997 Report, the *Criminal Justice Act 2003* codified the rule as it existed and extended the categories of exceptions. The provisions of the 2003 Act concerning hearsay were extended to Northern Ireland by the *Criminal Justice (Evidence)(Northern Ireland) Order 2004*.

5.31 Section 114 of the *Criminal Justice Act 2003* defines hearsay evidence as a statement not made in oral evidence in criminal proceedings and admissible as evidence of any matter stated but only if certain conditions are met, specifically where,

- (a) it is in the interests of justice for it to be admissible (section 114(1)(d)),
- (b) the witness is unavailable to attend (section 116),
- (c) the evidence is contained in a business, or other, document (section 117)³⁹
or
- (d) the evidence is multiple hearsay (section 121).

³⁵ The English Law Commission concluded that the discretion provisions in the *Criminal Justice Act 1988* did not work satisfactorily; judges consistently refused to exercise their discretion under the Act which resulted in uncertainty about the admission of evidence. See *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997: No. 245) at 1.29.

³⁶ Zander *The Police and Criminal Evidence Act 1984* (4th ed Thomson Sweet and Maxwell 2003) at 7-06.

³⁷ *Report of the Royal Commission on Criminal Justice*, ch 8, para 26.

³⁸ *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997: No. 245).

³⁹ Part II of the *Criminal Evidence Act 1992* already contains a similar exception.

5.32 The Commission considers that extending the current exceptions to cover these ‘safety valves’ as identified in section 114 of the *Criminal Justice Act 2003* is unnecessary. This model of reform relaxes the rule in such a manner as to potentially render the rule against hearsay redundant. The categories of admissible hearsay under this model are extended significantly and, in light of the constitutional protection afforded to the right to cross-examination, the Commission is of the provisional opinion that to allow in untested evidence from frightened and unavailable witnesses would undermine this right. The Commission notes that it has provisionally recommended that the courts should retain a discretion to develop the hearsay rule if the necessity exists.

5.33 The Commission does not favour allowing a discretion to admit defence hearsay only. This approach has been accepted to some extent by other jurisdictions⁴⁰ and in its 1997 Report the English Law Commission noted that Article 6(3)(d) of the European Convention on Human Rights places limits on the extent to which the prosecution may adduce evidence but it does not restrict the use of hearsay evidence by the defence. The Commission considers that differential treatment for the prosecution and the defence is undesirable, and indeed the Court of Criminal Appeal in *The People (Attorney General) v O’Brien*⁴¹ also took this approach. In its 1995 Report, the Scottish Law Commission gave an example “where there are co-accused, one accused might be entitled to elicit from a defence witness implicating a co-accused which the prosecution would not have been entitled to lead”⁴² creating an unsatisfactory dilemma for the court.

(3) Option 3: Judicial discretion based on necessity and reliability

5.34 This option recognises that the hearsay rule as a creature of the common law is best dealt with by judges on a principled level. As articulated by Lord Devlin, the judiciary may not be entitled to make new laws but they are better equipped than legislators to make new rules governing the admissibility of evidence.⁴³ This option would allow the courts to create new categories of hearsay exceptions where the judiciary deemed it was necessary.

⁴⁰ In Australia, sections 65(2) and (8) of the *Evidence Act 1995* allows for the admission of statements of unavailable witnesses adduced by the defence.

⁴¹ (1969) 1 Frewen 343, discussed at paragraph 2.18, above.

⁴² Scottish Law Commission Report *Evidence Report on Hearsay in Criminal Proceedings* (1995) No 149 at 4.32.

⁴³ Lord Devlin “Judges and Lawmakers” (1976) 39 MLR 1, 13.

5.35 The Commission has examined other jurisdictions to examine the relaxation of the hearsay rule in criminal proceedings. In Canada the preferred mode of reform has been the widening of judicial discretion to admit hearsay evidence based on a dual consideration of whether the evidence is cogent and reliable. This departure towards a more flexible judicial approach has stemmed from a number of decisions of the Supreme Court of Canada. It has held that new exceptions to the hearsay rule can be admitted if the requirements of 'reliability' and 'necessity' are met. In addition evidence will only be admitted under the traditional hearsay exceptions if it too satisfies the twin requirements.

5.36 In the Canadian case *R v D(D)*⁴⁴ a child who had been sexually abused identified the abuser to various adults but was too traumatised to give live testimony. The hearsay statements to the adults were admitted because the child was not available and because, having regard to the age and development of the child, the consistency of the repetition, the absence of a reason to fabricate and the absence of signs of prompting or manipulation, the evidence met the test of reliability. The New Zealand Law Commission recommended reform of the hearsay rule on this basis.

5.37 A major disadvantage in allowing development of the hearsay rule to proceed solely through judicial intervention based on the tests of necessity and reliability is the absence of clarity.⁴⁵ The Commission has provisionally concluded that it might also involve a pre-determination of the evidence, which would encroach on the role of the jury. Jurors may take the mistaken view that such evidence is unimpeachable because a judge has determined its reliability and may attach undue weight to it. The Commission is concerned that the concepts of reliability and necessity are vague terms and it considers that this option is not appropriate and may have an adverse effect on the integrity of the trial.

D Special Issues

(1) Previous statements of witnesses

5.38 The hearsay rule excludes the out-of-court statements of witnesses in so far as they are tendered as evidence of the facts asserted. However, such a statement may also be relevant to the credibility of the witness in that it reveals consistency or inconsistency with his testimony in court. Even if it is sought to be proved only for this limited purpose, it may be excluded by the rule against self-corroboration, sometimes called the rule against narrative.

⁴⁴ [1994] CCL 5873 (North West Territories Supreme Court).

⁴⁵ A number of participants in the Commission's roundtable discussion suggested that reliability and necessity were very difficult to measure.

According to this, a witness may not give evidence that, on a past occasion, he made a statement consistent with his testimony in court and other witnesses may not be called to prove that he made any such statement. Any previous statement inconsistent with his testimony in court may be proved but such a statement may only be used to discredit the witness's sworn testimony and is not evidence of the facts asserted in it.

5.39 If a witness, on cross-examination, admits that he has made a previous oral or written statement that is inconsistent with his testimony then no further proof of that statement is permitted. If the witness denies or does not admit to making the statement then it may be proved against him in accordance with sections 3, 4 and 5 of the *Criminal Procedure Act 1865* if it is relevant to the proceedings, which is a matter for the trial judge. Sections 3 to 5 provide:

“3. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

4. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

5. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.”

5.40 The Commission in its 1988 *Report on the Rule Against Hearsay in Civil Cases* recommended in relation to civil proceedings that the restrictions on

cross-examination contained in sections 3, 4 and 5 of the *Criminal Procedure Act 1865* should be repealed and the following provisions applied to the cross-examination of a witness on a previous statement made by him or her:

“(a) Any previous statement of a witness used in cross-examination should be made available to the other party to the litigation.

(b) Notwithstanding (a), it should remain permissible to cross-examine a witness about a previous statement made by him before his attention is drawn to its exact contents or any document containing it.

(c) Where a previous statement of a witness is used in his cross-examination, he should be entitled to comment thereon and explain any discrepancy between it and his testimony in court; and evidence should then be admissible without notice of other previous statements explaining or qualifying an inconsistency.”

(2) Hearsay and Sentencing

5.41 The rule against hearsay is relaxed significantly at the sentencing phase of the trial. This practice appears to indicate that the burden of proof has been discharged during the trial by the determination of the verdict. The rules of evidence are relaxed in relation to character evidence, so that hearsay evidence may be relied upon. In *The State (Stanbridge) v. Mahon*⁴⁶ Gannon J quoted from a judgment of the English Court of Criminal Appeal delivered by Goddard LCJ in *R v Marquis*⁴⁷:

“The other thing to which I desire to call attention is that the learned Recorder seems to have had some doubt whether he could accept what he called 'hearsay evidence' of character after conviction ... It would be a very unfortunate thing if evidence of that kind could not be given, because it would prevent evidence from being given in favour of the prisoner, and would prevent a police officer from saying: 'I have made inquiries of the prisoner's employer, he works well and his character is good'. After conviction, any information which can be put before the Court can be put before it in any manner which the Court will accept.”

5.42 In its 1993 *Consultation Paper on Sentencing*⁴⁸ the Commission noted that it is generally accepted that the role of the prosecution in sentencing is to provide the court with information and not to seek to influence the court's

⁴⁶ [1979] IR 214.

⁴⁷ (1951) 35 Cr App R 33.

⁴⁸ Law Reform Commission *Consultation Paper on Sentencing* (1993).

sentencing decision in any way. The Commission observed that a problem may occur when evidence of antecedents is being given by prosecution counsel or a Garda officer is that damaging general remarks about the defendant's character, which are not capable of substantiation, are made, having the effect of damning the offender in the eyes of the court:⁴⁹

“For example, the officer may state that the defendant “associates with known criminals “or is “known to the police” (i.e. he has often been in trouble with the police) or even that “there is a lot of this type of crime in the locality.” These types of remarks can be seen as attempts by the prosecution to influence the decisions of the sentencing court”.

5.43 In its *Consultation Paper on Sentencing* the Commission stated that the provision of rules of procedure would be useful as an authority to guide judges at the sentencing stage of restrictive rules of evidence including the hearsay rule, as there is little precedent on the matter.⁵⁰ The Australian Law Reform Commission (ALRC) noted that in respect of facts considered relevant by the court after conviction, the rules of admissibility are not applied strictly by sentencing courts to evidence adduced to prove those facts. To apply such rules, it is suggested, would transform the sentencing hearing into an adversarial proceeding, with increased costs and delays. It might also exclude some useful evidence for example of remorse, or that the offence was out of character.⁵¹ In its consideration of the matter, the ALRC stated that it was alive to the possibility of decisions being based on inaccurate or unfairly prejudicial material, but ultimately it did not recommend the imposition in all cases of exclusionary evidentiary rules where facts relevant to sentence are in dispute. “The reasons for requiring strict proof, by admissible evidence, of all relevant facts not admitted by the other party, do not apply to the sentencing hearing.”⁵²

⁴⁹ *Ibid* at 9.

⁵⁰ *Ibid* at 323.

⁵¹ Australian Law Reform Commission Report No 44 *Sentencing* at 98; as cited in Law Reform Commission *Consultation Paper on Sentencing* (LRC 1993) at 323.

⁵² Australian Law Reform Commission Report No 44 *Sentencing* at 99-100; as cited in Law Reform Commission *Consultation Paper on Sentencing* (LRC 1993) at 323.

E Conclusions and recommendations

5.44 The Commission now turns to set out its provisional recommendations on the hearsay rule in criminal proceedings.

5.45 *The Commission provisionally recommends that the existing exceptions to the hearsay rule in criminal proceedings should be retained.*

5.46 *The Commission provisionally recommends that, subject to the existing common law and statutory inclusionary exceptions, hearsay should continue to be excluded in criminal proceedings.*

5.47 *The Commission provisionally recommends that there should be no statutory introduction of a residual discretion to include hearsay evidence as to do so would undermine the exclusionary foundation of the rule.*

5.48 *The Commission provisionally recommends that the hearsay rule in criminal proceedings should apply in the same manner to the prosecution and the defence.*

5.49 *The Commission provisionally recommends that the concepts of reliability and necessity should not form the basis for reform of the hearsay rule in criminal cases.*

5.50 *The Commission notes that hearsay is habitually admitted during the sentencing stage in the statement of agreed facts and invites submissions on this practice.*

CHAPTER 6 SUMMARY OF PROVISIONAL RECOMMENDATIONS

The Commission's provisional recommendations in this Consultation Paper may be summarised as follows:

A General Scope of the Hearsay Rule and Guiding Principles

6.01 The Commission provisionally recommends that hearsay should be defined in legislation as any statement, whether a verbal statement, written document or conduct, which is made, generated or which occurred out of court involving a person who is not produced in court as a witness, and where the statement is presented as testimony to prove the truth of the facts which they assert. [Paragraph 2.13]

6.02 The Commission invites submissions as to whether implied assertions ought to be included in, or excluded from, the scope of the hearsay rule. [Paragraph 2.47]

6.03 The Commission provisionally recommends that, as a general principle, the giving of direct evidence that is capable of being tested by cross-examination should be preferred over hearsay. [Paragraph 2.120]

6.04 The Commission considers that the right to fair procedures under the Constitution of Ireland does not prohibit the admissibility of hearsay in all cases and does not, therefore, prevent reform of the hearsay rule towards an inclusionary approach in civil cases. [Paragraph 2.121]

6.05 The Commission acknowledges that the right to cross-examination in criminal trials under the Constitution of Ireland may place particular restrictions on reform of the hearsay rule towards an inclusionary approach in criminal cases. [Paragraph 2.122]

B Inclusionary Exceptions to the Hearsay Rule

6.06 The Commission provisionally recommends that the existing inclusionary exceptions to the hearsay rule should be retained, and notes that these include:

- Admissions and confessions;

- Spontaneous statements connected with the subject matter of the case (the *res gestae*);
- Dying declarations (currently admissible only in a murder and manslaughter case);
- Certain statements of persons since deceased (including statements by testators concerning the contents of their wills);
- Public documents; and
- Certain statements made in previous proceedings. [Paragraph 3.51]

6.07 The Commission provisionally recommends that the existing inclusionary exceptions to the hearsay rule should not be replaced by a general inclusionary approach based on inherent reliability. [Paragraph 3.52]

6.08 The Commission provisionally recommends that the courts should retain the discretion to determine whether hearsay may be included or excluded in an individual case. [Paragraph 3.75]

C Reform of the Hearsay Rule in Civil Cases

6.09 The Commission provisionally recommends that in civil proceedings evidence should not be excluded on the ground that it is hearsay. [Paragraph 4.107]

6.10 The Commission provisionally recommends that in civil proceedings, hearsay is admissible where:

(a) the maker of the statement is unavailable as a witness because he or she:

- is dead
- is in ill health and is unable to testify
- cannot be identified or found
- is outside the jurisdiction and it is not possible to obtain his or her evidence,

(b) requiring the maker of the statement to be a witness would cause undue delay or expense, and

(c) the court is satisfied that cross-examination of the witness is not necessary. [Paragraph 4.108]

6.11 The Commission provisionally recommends that no distinction should be drawn between first hand and multiple hearsay as it applies to civil proceedings. [Paragraph 4.109]

6.12 The Commission invites submissions on whether the inclusion of hearsay evidence should extend to hearsay in rebuttal of testimony given on affirmation or oath which was tested by cross-examination. [Paragraph 4.110]

6.13 The Commission provisionally recommends that a party intending to introduce hearsay as evidence in civil proceedings should provide advance notice of that intention to other parties. [Paragraph 4.111]

6.14 The Commission provisionally recommends that when a party gives notice of its intention to adduce hearsay, it should state the nature of the hearsay evidence and that reasons must be stated in the notice as to why the party cannot call the maker of the hearsay statement. [Paragraph 4.112]

6.15 The Commission provisionally recommends that if a party seeks to adduce hearsay the other party or parties may request further particulars of the evidence and that these should be given by the party seeking to adduce the hearsay where it is reasonable to do so. [Paragraph 4.113]

6.16 The Commission provisionally recommends that if a party seeks to adduce hearsay, the other party or parties may apply to the court for leave to call the witness and examine him on his statement. [Paragraph 4.114]

6.17 The Commission provisionally recommends that the party offering the evidence should be obliged to offer evidence of the maker's credibility so far as this is possible. [Paragraph 4.115]

6.18 The Commission provisionally recommends that the advance notice requirement may be waived on the consent of the parties and in the discretion of the court where the other parties are not prejudiced by the failure to give notice. [Paragraph 4.116]

6.19 The Commission provisionally recommends that the weight to be attached to hearsay is a matter for the court and that the court should retain a general discretion to exclude evidence that is prejudicial, confusing, misleading or time-wasting. [Paragraph 4.117]

D Reform of the Hearsay Rule in Criminal Cases

6.20 The Commission provisionally recommends that the existing exceptions to the hearsay rule in criminal proceedings should be retained. [Paragraph 5.45]

6.21 The Commission provisionally recommends that, subject to the existing common law and statutory inclusionary exceptions, hearsay should continue to be excluded in criminal proceedings. [Paragraph 5.46]

6.22 The Commission provisionally recommends that there should be no statutory introduction of a residual discretion to include hearsay evidence as to

do so would undermine the exclusionary foundation of the rule. [Paragraph 5.47]

6.23 The Commission provisionally recommends that the hearsay rule in criminal proceedings should apply in the same manner to the prosecution and the defence. [Paragraph 5.48]

6.24 The Commission provisionally recommends that the concepts of reliability and necessity should not form the basis for reform of the hearsay rule in criminal cases. [Paragraph 5.49]

6.25 The Commission notes that hearsay is habitually admitted during the sentencing stage in the statement of agreed facts and invites submissions on this practice. [Paragraph 5.50]



The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

This role is carried out primarily under a Programme of Law Reform. The Commission's *Third Programme of Law Reform 2008-2014* was prepared and approved under the 1975 Act following broad consultation and discussion. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role also includes two other areas of activity, Statute Law Restatement and the Legislation Directory. Statute Law Restatement involves incorporating all amendments to an Act into a single text, making legislation more accessible. The Legislation Directory (previously called the Chronological Tables of the Statutes) is a searchable guide to legislative changes.

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