

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

Report
(LRC 25-1988)

REPORT ON
THE RULE AGAINST HEARSAY IN CIVIL CASES

IRELAND
The Law Reform Commission
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CONTENTS

	<i>Page</i>
LETTER OF 18 AUGUST 1988 FROM THE PRESIDENT TO AN TAOISEACH	vii
CHAPTER 1: INTRODUCTION	1
CHAPTER 2: POLICY CONSIDERATIONS	3
(1) General	3
(2) Nature of the Rule Against Hearsay	4
(3) Hearsay in Criminal Cases	8
(4) Note on Recommendations	9
Footnotes to Chapter 2	10
CHAPTER 3: DEVELOPMENTS IN THE LAW SINCE THE 1980 WORKING PAPER	11
CHAPTER 4: RECOMMENDATIONS OF THE COMMISSION	20
CHAPTER 5: GENERAL SCHEME OF A BILL TO REFORM THE LAW RELATING TO THE ADMISSIBILITY OF OUT-OF-COURT STATEMENTS IN CIVIL CASES	25
LIST OF COMMISSION PUBLICATIONS	31

CHAPTER 1: INTRODUCTION

1. In its programme prepared in 1976 and approved by the Government, the Commission pointed out that the revision and codification of the law of evidence, both civil and criminal, had been a subject much discussed for many years in common law countries. It was noted that there seemed to be general agreement as to the desirability of a code or codes of evidence, if such should prove to be practical. The Commission appreciated, however, that, because of the immensity of the task, it would not be feasible to undertake the preparation of comprehensive codes all at once. Accordingly, it proposed that particular areas of the law should be examined with a view to reform and that the reform should be designed to "fit into an ultimate whole" without the necessity for any subsequent substantial change. Priority would be given to areas where the reforms would simplify and improve court procedures and a number of problems were identified as being particularly suitable for scrutiny.
2. The Commission completed its work on one of these selected topics in July 1985 when it presented its Report on the *Competence and Compellability of Spouses as Witnesses*. (It is noted, however, that to date no action has been taken to implement any of the recommendations in the Report.) It had already published a Working Paper on another of the topics, *The Rule Against Hearsay*, in April 1980.
3. When the present members of the Commission took up office in January 1987, progress on its programme, including the section on evidence, was reviewed. It was noted that, although the Working Paper on Hearsay had been in circulation for seven years, only one observation had been received in relation to it. Fresh efforts by the Commission to stimulate a response to this Paper resulted in the submission of one further observation. The Commission has concluded that, in the absence of any express dissent from any of the major recommendations in the Working Paper, it can be safely assumed

that there is a general acceptance of the desirability of these proposals. It has, however, also given careful consideration to the necessity for any further revisions in these recommendations. It should be noted that the recommendations in the Working Paper were confined to civil cases and the Commission has decided to adhere to this position. However, as we point out in the body of the Report, it should not be assumed that no changes are required in the criminal law relating to hearsay. Problems attendant on the existing law as it applies to criminal prosecutions have already been addressed in our *Report on Receiving Stolen Property* (LRC 23-1987). Others will be considered as we proceed with our further examination of inadequacies in the criminal law.

4. The 1980 Working Paper contained a full statement of the law relating to Hearsay and a review of proposals made elsewhere for its reform. The Commission does not consider it necessary to reproduce all this material in this final Report but a chapter on developments subsequent to 1980 is included. Minor changes to the recommendations in the Working Paper are also detailed.

5. The Commission wishes to thank Mr Justice Niall MacCarthy, Judge of the Supreme Court, and Mr Eamonn Hall, Solicitor to Bord Telecom Eireann, for their observations which were of great assistance to the Commission. The Commission also wishes to thank Mr Charles Lysaght, former Research Counsellor to the Commission, who was responsible for the research which led to the 1980 Working Paper and for drafting that Paper and who contributed generously with advice and assistance to the preparation of this Report after his secondment to the Commission had come to an end. It should, however, be emphasised that the Commission itself is solely responsible for the contents of the Report.

6. In this Report the law is stated as of 1st July 1988.

CHAPTER 2: POLICY CONSIDERATIONS

(1) *General*

1. In considering proposals for the reform of the law of evidence, it is necessary to identify at the outset the purposes which that law should serve. It has been said that the object of all legal trials, civil and criminal, is "the ascertainment of truth".¹ But this is an incomplete and misleading statement since, under the adversarial system of justice employed in our courts, the tribunal, whether judge or jury, is in general confined in reaching its decision to the evidence which the parties choose to produce. If the ascertainment of truth were the objective, a trial judge would be entitled to call witnesses himself and he would have far wider powers than he enjoys under the present law as to the questions he could properly ask witnesses. In such an adversarial system, the function of the law of evidence is not to ensure that all the relevant facts are proved. It has two functions: to determine *how* facts may be proved in a court of law and what facts may *not* be proved there.

2. In assessing the need for reform in any of the existing rules of evidence, the historical background against which those rules have evolved is also of importance. There was a fashionable view that the law of evidence was "the child of the jury system".² Proponents of this view argued that the law of evidence developed because it was thought that juries needed to be protected from hearing evidence the value of which they might not be able to estimate or which they might misunderstand. More recently, a different view has found favour which associates the development of the law of evidence with the growing importance of advocates in jury trials and the decline in the dominance of judges over juries.³ However that may be, there can be little doubt that, as the law of evidence crystallized in the nineteenth century into what is still its present form in Ireland, many of its principles, including the Rule Against Hearsay with which this Report is

concerned, were justified and rationalised on the basis of the supposed frailty of the jury.⁴

3. What criteria should be adopted by the Commission in formulating proposals for the reform of the present law? We cannot improve upon the statement of criteria adopted by the Australian Law Reform Commission when they considered the law of evidence in general and suggested that the enquiry should be whether the rules of evidence:

- adequately reflect their alleged rationale and other relevant policy considerations
- are unnecessarily uncertain
- exclude probative evidence
- operate unfairly on parties and witnesses
- are too complex to be understood or applied
- add to costs and time both in and out of court.”⁵

(2) *Nature of the Rule Against Hearsay*

4. Under the law of evidence, the evidence adduced must be the best evidence available, i.e. to ascertain what John saw, you call John, not his mother. His mother’s evidence of what John told her he saw is what lawyers call “hearsay”. The following is a more formal definition:

“Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of an out of court asserter.”⁶

Hearsay is excluded because the twin safeguards of an oath and cross-examination do not attend its introduction. 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 then subjected to cross-examination in the presence of the court. A hearsay statement is, by definition, not made before the court and, if the maker does not testify, he cannot be cross-examined nor can his demeanour be observed or his credibility tested. Where the hearsay statement narrated is oral, there is the possibility that it may be altered in the telling. Where it is made formally, there is the danger that it will be tailored to the requirement of the party making it. A further reason sometimes given for the rule is the possibility that a jury, where there is one, will be confused by a proliferation of evidence of little value. This would add to the cost of litigation. Hearsay evidence is also said to operate unfairly by catching the other party by surprise.

5. Not all hearsay, however, is necessarily unreliable and this branch of the law of evidence is concerned in the main with the exceptions to the rule. Such exceptions are in general made when other factors give the evidence a “ring” of reliability. Thus, the main exceptions to the

rule arise where the statement of its very nature is likely to be true, e.g. where a person makes an admission against his own interests, statements in public documents, contemporaneous and spontaneous statements made "in the heat of events" and therefore unlikely to be invented (because there would not be time to do so) and declarations made in the course of duty. The exceptions have, however, developed in a piecemeal fashion and the law cannot be regarded as coherent and logical. As Professors Morgan and Maguire noted:

"There is in truth no one theory which will account for the decisions [to allow hearsay]. Sometimes an historical accident is the explanation; in some instances sheer need for the evidence overrides the court's distrust for the jury; in others only the adversary notion of litigation can account for the reception; and in still others either the absence of a motive to falsify, or a positive urge to tell the truth as the declarant believes it to be, can be found to justify admissibility. Within a single exception are found refinements and qualifications inconsistent with the reason upon which the exception itself is built. In short, a picture of the hearsay rule with its exceptions would resemble an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists."⁷

Lord Reid has this to say about the development of the exceptions:

"The rule has never been absolute. By the nineteenth century many exceptions had become well established, but again in most cases we do not know how or when the exception came to be recognised. It does seem, however, that in many cases there was justification either in principle or logic for carrying the exception just so far and no further. One might hazard a surmise that when the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently far to meet that case, and without regard to any question of principle. But this kind of judicial legislation became less and less acceptable and well over a century ago the patchwork which then existed seems to have become stereotyped. The natural result has been the growth of more and more fine distinctions so that it now takes even so concise an author as Professor Cross over one hundred closely packed pages to explain the law of hearsay evidence."⁸

6. The existing law, in so far as it consists of exceptions to the rule, can therefore legitimately be criticised as illogical, arbitrary and unduly complex. In addition, the general law as to hearsay, whatever the historical reasons may be, is manifestly far too restrictive. The disadvantages of the rule have been well summarised by the Criminal Law Revision Committee in England as follows:

"First, it results in injustice where a witness who could prove a fact in issue is dead or unavailable to be called; secondly, it adds to the cost of proving facts in issue which are not really in dispute; thirdly, it adds greatly to the technicality of the law of evidence because of its numerous exceptions; fourthly, it

deprives the court of material which would be of value in ascertaining the truth; and fifthly, it often confuses witnesses and prevents them from telling their story in the witness box in the natural way.”⁹

Two examples of the manner in which the rule can operate will suffice. An issue arises in a case as to whether a witness was suffering from a particular illness ten years ago. The doctor whom he attended at the time is dead. His notes setting out fully the details of the illness are in the possession of his partner who succeeded to the practice and who can identify his handwriting. The hearsay rule forbids the introduction of the notes in evidence. To the layman, this rightly seems incomprehensible. The court is deprived of the only evidence available on a particular issue and blatant injustice may result to the party seeking to produce the evidence. Of the various reasons given for rejecting hearsay evidence, the only relevant one is the fact that the evidence is not given on oath and is not subject to cross-examination. Yet as a matter of common sense this is manifestly heavily outweighed as a factor by the advantageous feature of the evidence, i.e. that it represents the doctor’s contemporary finding rather than what he may recall in the witness box ten years later. (As a matter of practice, in any event, were he alive, he would be allowed to “refresh his memory” by reference to his notes, which would then become in fact, if not in legal theory, the actual evidence.)

Again, in order to establish a particular fact, it may be necessary to produce the records of a firm. It may be impossible to identify the person who compiled the records or, if identifiable, he may be dead or unable for some other reason to give evidence. There may be no reason to doubt the inherent reliability of the records. Yet it has been held in England that such records must be excluded.¹⁰ The difficulties which flow from so rigid a rule in an age when the widespread use of computers makes the compilation of such records increasingly less dependent on human agency need hardly be stressed.

7. It is not to be thought that the Rule Against Hearsay is without rationale or justification. On the contrary, it is clearly preferable that evidence should be given orally in court and tested by cross-examination. But this 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.

8. The Commission considers that the approach which most effectively deals with the inadequacies in the present law is that adopted in the Working Paper, i.e. of providing that, in general, hearsay evidence should be admissible, but also providing that certain conditions must be met and specific safeguards observed before it is admitted. They may be summarised as follows:

- (1) the Judge should have a discretion to exclude any out-of-court statement which is of insufficient probative value;

- (2) the admissibility of such evidence should be conditional upon the person who is the source of the information being called and subjected to cross-examination whenever he is available;
- (3) advance notice should be required of the intention to call such evidence, unless the court in stated circumstances waives that requirement.

This, in the view of the Commission, is preferable to a rigidly exclusionary approach subject to exceptions, which must carry the serious risk that valuable and relevant evidence not coming within any of the specific exceptions will be excluded. The reasoning on this matter in the Working Paper has not evoked any dissent and is in line with the approach adopted in some other common law jurisdictions.

9. The Commission also considered in the Working Paper the desirability of excluding secondhand hearsay in any scheme of reform. It was pointed out that the English Civil Evidence Act 1968 excluded such evidence, following the recommendation to that effect of the 13th Report of the English Law Reform Committee. In support of its recommendation, the Committee had said that

“where John gives evidence of what George said that William (who alone had personal knowledge of the matter) said, the honesty and accuracy of the recollection of George is the necessary link in the chain upon which the probative value of William’s statement depends. There was no way of estimating the strength of that link unless George was called as a witness. The court thus lacks the material upon which to estimate the weight to be attached to William’s statement as probative of the fact in issue.”¹¹

Allowing such evidence would, in their view, open the door to the admission of all sorts of rumours and involve the risk of “proliferation of hearsay evidence of minimal probative value”. The New South Wales Law Reform Commission, however, in their *Report on the Rule Against Hearsay* (1978) recommended that a more permissive attitude might be adopted towards multiple (i.e. second-hand and more remote) hearsay statements contained in documents.

The Working Paper pointed out that the difficulty about such proposals restricting the categories of hearsay evidence which are admissible is that there will inevitably be cases where valuable evidence is excluded. It concluded 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.

The Commission has decided to adhere to this recommendation. While recognising that our approach in this context is not the same as in some other common law jurisdictions, we have also noted that, since the publication of the Working Paper, an approach similar to our provisional view has been adopted by the Scottish Law Commission in its Report on Evidence published in 1986.

10 The Commission acknowledges that, in theory, the effect of such a complete abolition of the Rule Against Hearsay is that mere rumour, the unsubstantiated statements of unidentifiable witnesses and much other evidence of little or no probative value would be let in. But it is not considered that this is a real danger in civil cases because confusion is unlikely to assist the party creating it. Moreover, the discretion which it is proposed that the Judge should have to exclude any out-of-court statement which is of insufficient probative value together with the other safeguards mentioned in paragraph 8, should be adequate to prevent a proliferation of evidence of negligible value.

11 The case for adopting a substantially more liberal attitude to the relaxation of the hearsay rule is also reinforced by the recent passage of the Courts Act 1988. The abolition of the right to a trial by jury in cases of personal injuries resulting from negligence, breach of duty and nuisance thereby effected means that the overwhelming bulk of civil litigation will now be heard by judges sitting alone. As we have noted, the rationale of the present highly restrictive hearsay rule is the supposed inability of juries to distinguish between evidence of greater or less probative value and the likelihood of confusion arising in their minds. That approach (which was, in any event, difficult to justify with the modern jury, significantly better educated and more sophisticated than its predecessors) has now ceased to be relevant in any but the most restricted range of civil proceedings.

(3) *Hearsay in Criminal Cases*

12 The Commission in its Working Paper confined its recommendations to civil cases. It was pointed out that special considerations apply to criminal proceedings. The standard of proof beyond reasonable doubt which is applicable in such proceedings demands that convictions should be sustained only on the basis of evidence of undoubted reliability. Whereas in civil cases neither side has an incentive to confuse the tribunal by adducing a proliferation of evidence of little value, the defence in criminal cases may seek to create a doubt by this tactic, especially in jury trials. Moreover, the tendency to fanciful defences, already a cause of concern since the introduction of criminal legal aid, would be accentuated. Laxer standards would also give more scope for the fabrication of evidence consisting of statements of absent persons, which might be availed of by the professional criminal. In so far as the hearsay rule is justified by reference to the system of jury trials, the abolition of the right to trial by jury in practically all civil cases has created another significant difference between criminal and civil cases. However, it must be said that if the present rule against hearsay were to be retained in criminal cases while being relaxed in civil cases, anomalies would result. For example, a person sued for fraud might be 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.

13. The Commission has concluded that it should adhere to the view it took in the Working Paper, i.e. to confine its recommendations to the civil law. Experience in practice in civil cases after the proposed alterations to the law will be a valuable guide and testing ground for the new regime. Accordingly, in this Report, it is proposed to recommend reform in the context of civil proceedings without considering whether a similar reform would be justified in criminal proceedings.

(4) *Note on Recommendations*

14. The recommendations in this Report accordingly are generally in line with the recommendations provisionally made in the Working Paper. In some instances, the opportunity has been taken to introduce minor modifications which seemed desirable, but the general scheme of reform originally proposed has not been significantly modified. It will be observed that the Commission's proposals designed to facilitate the admission of business and administrative records differ from those recommended in its *Report on Receiving Stolen Property* (LRC 23-1987). The latter proposals incorporate more stringent and elaborate safeguards than we have recommended for civil proceedings. As has already been pointed out, different considerations apply in criminal proceedings, having regard both to the heavier burden of proof and the greater dangers which flow from the admissibility of hearsay evidence.

FOOTNOTES TO CHAPTER 2

¹ Lord Maugham, *Observations on the Law of Evidence with special reference to documentary evidence* (1939) 17 Can Bar Rev 469

² JB Thayer, *Preliminary Treatise on Evidence at the Common Law*

³ EM Morgan, *Some problems of proof under the Anglo American system of litigation* (New York, 1956)

⁴ *Ibid*

⁵ Report No 26 (interim) on *Evidence*, Vol 1 p 38

⁶ McCormick, *Evidence*, 2nd ed (1972) p 584

⁷ Morgan and Maguire, *Looking Backward and Forward at Evidence* (1937) 50 Harv L R 909, at 921

⁸ [1965] AC 1001, 1019-20 (HL) Wigmore takes over a thousand pages

⁹ Criminal Law Revision Committee, 11th Report, Evidence (general)

¹⁰ *Myers v Director of Public Prosecutions* [1965] AC 1001 The point has yet to be decided in Ireland see pp 11, 15-16 *infra*

¹¹ Law Reform Committee 13th Report, para 15

CHAPTER 3: DEVELOPMENTS IN THE LAW SINCE THE 1980
WORKING PAPER

1. As we have explained in Chapter 1, we think it unnecessary to reprint all the material in the 1980 Working Paper. In this chapter, we give details of developments in the law in this and other jurisdictions since it was published.

*Working
Paper
Reference*

Page 2

Fn. 1: See also *R v Blastland* [1986] A.C. 41.

Page 6:

Under Order 39 of the Rules of the Superior Courts and Order 20 of the Rules of the Circuit Court, an order may be made that any witness whose attendance may be dispensed with shall be examined by interrogatories or otherwise before a Commissioner or Examiner; letters of request may be issued by the competent judicial authorities in other countries; and evidence may be taken before Irish Consuls abroad. (See Law Reform Commission, *Report on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (LRC 16-1985))

Page 9:

The Court of Criminal Appeal have, however, in two cases expressly reserved the question as to whether *Myers* was correctly decided: *The People v Marley* [1985] I.L.R.M. 17; *The People v Prunty* [1986] I.L.R.M. 716.

Page 19:

Insert the following after line 15:
“This is also the effect of the *Canada Evidence Bill 1982* and the recommendations of the Law Reform Commission

in Australia (Report No 38), both of which make hearsay generally admissible subject to certain exceptions, most of which require that the hearsay be first hand ”

- Page 26* Add the following sentence at the end of the first paragraph
 “It is noted that this approach is in line with that adopted by the Scottish Law Commission in its Report on Evidence published in 1986 ”
- Page 26* Add to fn 33 the following
 “Under the Scottish Law Commission proposals a hearsay statement may be excluded if the court considers it reasonable and practicable for the maker of the statement to be led as a witness (*op cit* , p 30)”
- Page 27* Insert the following on line 19 after “of it”
 “This seems to happen regularly see Scottish Law Commission, Evidence, Report on Corroboration, Hearsay and Related Matters in Civil Proceedings 1986, para 3 32, Heydon, *Evidence, Cases and Materials*, 2nd edition pp 361-362 ”
- Page 31* Insert the following additional paragraphs before the paragraph beginning “these various solutions”
 “In New Zealand, the *Evidence Amendment Act (No 2) 1980*, which made first-hand oral hearsay and documentary hearsay evidence admissible where the maker of the statement was unavailable, provides in section 2(2) that
 ‘ a person is unavailable to give evidence in any proceedings if, but only if, he —
 (a) Is dead, or
 (b) Is outside New Zealand and it is not reasonably practicable to obtain his evidence, or
 (c) Is unfit by reason of old age or his bodily or mental condition to attend, or
 (d) Cannot with reasonable diligence be found ’
 “Under the *Canada Evidence Bill, 1982*, it is provided that in a civil proceeding in which the declarant or his testimony is unavailable, a statement is admissible to prove the truth of the matter asserted if it would have been admissible had the declarant made it while testifying (Section 52) Section 49 of the Act deals with the definition of availability
 ‘(1) In a civil proceeding, a declarant or his testimony shall be considered to be unavailable only if the declarant

- (a) is deceased or unfit to testify by reason of his physical or mental condition;
- (b) cannot with reasonable diligence be identified, found, brought before the court or examined out of the court's jurisdiction;
- (c) despite a court order, persists in refusing to take an oath or to make a solemn affirmation as a witness or to testify concerning the subject-matter of his statement;
or
- (d) is absent from the hearing and the importance of the issue or the added reliability of his testimony does not justify the expense or inconvenience of procuring his attendance or deposition.'

"In criminal proceedings where the statements of unavailable witnesses are admissible in certain circumstances, a declarant or his testimony is considered to be unavailable only if the declarant is deceased or unfit to testify by reason of his physical or mental condition.

"The draft Bill attached to the Report on Evidence of the Law Reform Commission in Australia also makes 'the previous representations' of unavailable witnesses admissible but does not define unavailability. (Law Reform Commission, Report No. 38, Evidence, Appendix A, Evidence Bill, section 56.) However the Report on which it was based envisaged that 'the maker should be regarded as being unavailable where he or she was legally incompetent or not permitted by law to give the evidence, was dead, could not be identified or found after reasonable efforts, or had resisted all reasonable steps to compel the giving of the evidence'. (Ibid., p. 73)."

Page 33: Insert the following on line 15 after "identity":
"The Federal Rules of Evidence in the United States and the Canada Evidence Bill 1982 both provide that a hearsay statement of an unavailable person is not admissible if the unavailability of the person who made it was brought about by the proponent of the statement for the purpose of preventing the person from attending or testifying."

Page 34: Insert the following at the end of the page:
"Section 30(9) of the *Canada Evidence Bill 1982* provides that:
'any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceedings'."

- Page 37* Add the following in line 3 after “within the country”
 “This is the position under the *Canada Evidence Bill 1982* ”
- Page 41* On line 5, insert the following sentence
 “It is also the recommendation made by the Law Reform Commission in Australia and the Scottish Law Reform Commission ”
- Page 43* Insert the following at the end of the second paragraph
 “Order 31, Rule 29 of the Rules of the Superior Courts now provides
 ‘Any person not a party to the cause or matter before the Court who appears to the Court to be likely to have or to have had in his possession custody or power any documents which are relevant to an issue arising or likely to arise out of the cause or matter or is likely to be in a position to give evidence relevant to any such issue may by leave of the Court upon the application of any party to the said cause or matter be directed by order of the Court to answer such interrogatories or to make discovery of such documents or to permit inspection of such documents The provisions of this Order shall apply *mutatis mutandis* as if the said Order of the Court had been directed to a party to the said cause or matter provided always that the party seeking such order shall indemnify such person in respect of all costs thereby reasonably incurred by such person and such costs borne by the said party shall be deemed to be costs of that party for the purposes of Order 99’
 “The validity of this provision has recently been unsuccessfully challenged in the High Court (See *Fitzpatrick & Another v Independent Newspapers plc and Another* unreported, Costello J, judgment delivered 19 May 1988 *Holloway v Belenos Publications and Another*, unreported Barron J, judgment delivered 14 June 1988)”
- Page 52* *Insert the following after line 18*
 “(See now *R v Weeks* Court of Criminal Appeal, 6 November 1987, noted [1988] Cr Law Review, p 244)”
- Page 57* Add the following at line 8
 “(See also the Scottish Law Commission Report on Evidence) However the Federal Rules of Evidence in the United States limit the admissibility of the prior statements of witnesses to inconsistent statements statements rebutting fabrication by the witnesses and, in what would generally be a criminal context statements of identification of a person made after perceiving him (Federal Rules of Evidence (1975) Rule 801) *The Canada Evidence Bill 1982* follows this scheme and also provides that where a witness is unable to recall a recorded matter of which he once had knowledge the record is admissible if it was

made or verified while the matter was still fresh in his mind or it is a transcript of testimony given by him on a prior occasion when he was subject to cross-examination. (*Canada Evidence Bill 1982*, Clauses 46-48, 113, 117, 118.) The Australian Law Reform Commission also maintained the general rule making the previous statement of a witness inadmissible but made an exception for cases where the statement was made while the occurrence of the asserted fact was fresh in the memory of the witness. The New Zealand legislation is more specific. Under it a previous statement of a witness is not admissible 'unless the court is of opinion that its probative value outweighs or may outweigh the probative value of the evidence given by the witness in reference to those matters'."

- Page 64:* Delete the last sentence and substitute therefor the following:
 "The *Canada Evidence Bill 1982* permits cross-examination by a party of his own witness without proof of adversity where that witness has previously made a statement inconsistent with his testimony."
- Page 79:* *Myers* has been mentioned in two subsequent decisions of the Court of Criminal Appeal: *The People v Marley* [1985] I.L.R.M. 17 and *The People v Prunty* [1986] I.L.R.M. 716. The effect of these decisions is discussed in our *Report on Receiving Stolen Property*. In both cases, the court expressly reserved the question as to whether *Myers* should be applied in Ireland. The Commission noted with surprise that although the court in both cases expressly declined to say that *Myers* represented the law in this jurisdiction, it is apparently assumed in prosecutions for receiving (where the question frequently arises) that it does represent the law.
- Pages 83 and 84* Delete the last paragraph on page 83 and the first line of the second paragraph on page 84 and substitute the following:
 "In England the admissibility of records is now governed by the *Civil Evidence Act 1968* and the *Police and Criminal Evidence Act 1984*."
 Delete fn. 117 on page 84.
- Page 87:* Insert the following additional paragraph after the end of the first paragraph:
 "The admissibility of evidence from documentary records and computer records in criminal proceedings in England is now governed by sections 68 and 69 of the *Police and Criminal Evidence Act 1984*. Section 68 provides that:
 '(1) Subject to section 69 below, a statement in a document shall be admissible in any proceedings as evidence of any

fact stated therein of which direct oral evidence would be admissible if —

- (a) The document is or forms part of a record compiled by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information; and
- (b) any condition relating to the person who supplied the information which is specified in subsection (2) below is satisfied.

(2) The conditions mentioned in subsection (1)(b) above are —

- (a) that the person who supplied the information
 - (i) is dead or by reason of his bodily or mental condition unfit to attend as a witness;
 - (ii) is outside the United Kingdom and it is not reasonably practical to secure his attendance; or
 - (iii) cannot reasonably be expected (having regard to the time which has elapsed since he supplied or acquired the information and to all the circumstances) to have any recollection of the matters dealt with in that information;
- (b) that all reasonable steps have been taken to identify the person who supplied the information but that he cannot be identified; and
- (c) that, the identity of the person who supplied the information being known, all reasonable steps have been taken to find him, but that he cannot be found.

(3) Nothing in this section shall prejudice the admissibility of any evidence that would be admissible apart from this section.'

“Section 69 provides that:

'(1) In any proceedings, a statement contained in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown:

- (a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer;
- (b) that at all material times the computer was operating properly, or, if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and
- (c) that any relevant conditions specified in rules of court under subsection (2) below are satisfied.

(2) Provision may be made by rules of court requiring that in any proceedings where it is desired to give a statement in evidence by virtue of this section such information concerning the statement as may be required by the rules shall be provided in such form and at such time as may be so required’.”

Pages Delete these pages and substitute therefor the following:
114/128: “Difficult questions arise as to the *Competence and Compellability of Spouses as Witnesses* which are addressed in the Commission’s Report under that title (LRC 13-1985). The problems largely arise in criminal proceedings. In civil proceedings, while there are some residual doubts as to the compellability of spouses in a limited range of cases, there is no doubt as to their competence in all cases, subject to some doubt as to the competence of *former* spouses, again in a limited range of cases. In these circumstances, it is unnecessary to provide for the admissibility of out-of-court statements by spouses incompetent to testify. (The Commission in its Report recommended that the law be put beyond doubt by providing that spouses are competent and compellable in all civil proceedings, but this recommendation, in common with all the other recommendations in the Report, has not been implemented.)

Page 130: Delete the final sentence in the first paragraph and substitute therefor the following:
 “The rules as they existed in 1978 were considered by the *Committee to Recommend Certain Safeguards for Persons in Custody and for Members of the Garda Síochána* under the chairmanship of Mr Justice Barra Ó Briain which reported in April 1978. The circumstances in which such confessions may be admissible, and in particular their liability to exclusion when obtained in conscious and deliberate violation of any of the constitutional rights of the accused, have been the subject of much judicial discussion and controversy in legal and academic circles since 1978. (See *The People (Attorney General) v O’Brien*, (1965) I.R. 142; *The People (D.P.P.) v Madden*, (1977) I.R. 336; *The People (D.P.P.) v Shaw*, (1982) I.R. 1; *The People (D.P.P.) v Lynch*, (1982) I.R. 64; *The People (D.P.P.) v Conroy*, (1988) I.L.R.M. 4.) It is not proposed to re-examine the topic in this Working Paper.”

Page 174: The House of Lords has recently reaffirmed the rule excluding confessions by persons other than the accused: *R v Blastland*, [1986] A.C. 41.

Page 184 The law on this has not been amended or affected by the *Status of Children Act, 1987*, as section 3, which states that the relationship between every person and its father and mother (or either of them) shall be determined irrespective of whether its father and mother are married to one another, is applicable only "in deducing any relationship for the purposes of the Act or of any Act of the Oireachtas passed after the commencement of this section" It does not, therefore, affect the pre-existing law on declarations as to pedigree in the case of illegitimate children

Page 191 More recently, in a criminal context in England, the House of Lords has ruled that, while statements made to a witness by a third party which were tendered in evidence to prove the state of mind of the maker of the statement or of the recipient were not excluded by the hearsay rule, this principle could "only apply when the state of mind evidenced by the statement is either itself directly in issue at the trial or of direct and immediate relevance to an issue which arises at the trial" (*R v Blastland* [1986] A C 41 at 54) In answer to a question the House said that the admissibility of a statement tendered in evidence as proof of the maker's knowledge or other state of mind must always depend on the degree of relevance of the state of mind sought to be proved to the issue in relation to which the evidence is tendered (*Ibid*, at p 62) In the actual case the accused had wanted to put in evidence a statement by a third party (Mark) who, it was suggested, had committed the crime, showing that he knew of the crime before the body was discovered The House of Lords held that the evidence was rightly excluded Lord Bridge said

"The issue at the trial of the appellant was whether it was proved that the appellant had bugged and murdered Karl Fletcher Mark's knowledge that Karl had been murdered was neither itself in issue, nor was it, *per se*, of any relevance to the issue What was relevant was not the fact of Mark's knowledge but how he had come by that knowledge He might have done so in a number of ways, but the two most obvious possibilities were either that he had witnessed the commission of the murder by the appellant or that he had committed it himself The statements which it was sought to prove that Mark made, indicating his knowledge of the murder, provided no rational basis whatever on which the jury could be invited to draw an inference as to the source of that knowledge To do so would have been mere speculation Thus, to allow this evidence of what Mark said to be put before the jury as supporting the conclusion that he, rather than the appellant, may have been the murderer seems to me, in the light of the principles on which the exclusion of hearsay

depends, to be open to still graver objection than allowing evidence that he had directly admitted the crime. If the latter is excluded as evidence to which no probative value can safely be attributed, the same objection applies *a fortiori* to the admission of the former." *Ibid.*, at 54. (For criticism of the decision see Carter, *Hearsay, Relevance and Admissibility: Declarations as to the State of Mind and Declarations Against Penal Interest*, 103 (1987) L.Q.R. 106; TRS Allan, *Hearsay Exception Subject to Relevance - Relevance Subject to Hearsay* [1985] C.L.J. 345.)

Page 194: See also the *Canada Evidence Bill 1982*.

CHAPTER 4 RECOMMENDATIONS OF THE COMMISSION

- 1 (1) An out-of-court statement should be admissible as evidence of any fact therein of which direct oral evidence by the maker would be admissible if —
- (a) the maker and, where the maker had not personal knowledge of the facts asserted, the person from whom the information derived,
 - (i) are dead,
 - (ii) are unable by reason of their health to testify,
 - (iii) cannot be identified or found,
 - (iv) being competent or compellable witnesses, refuse to be sworn or to testify, or
 - (v) are outside the jurisdiction and it is not possible to obtain their evidence,
 - (b) advance notice is given to the other parties, a requirement which may, however, be waived in the discretion of the court if the other parties are not prejudiced by the failure to give notice, and
 - (c) the statement is proved in court by the best evidence available

Note Recommendation 1 (a) (v) was not included in the Working Paper, but it is clearly desirable that the statement should be admissible in such circumstances

(2) A statement should be defined to include conduct which is intended to be assertive and any verbal utterance or statement in a document, whether or not it is intended to be assertive

Note The Commission has decided not to recommend that a judge should have discretion to admit depositions evidence taken on commission and statements on affidavit where the importance of the evidence does not justify the expense of bringing a witness to court. This recommendation was made in the Working Paper, but

having reconsidered the matter in the light of the constitutional difficulties that might arise if a right to cross-examine a witness were denied, the Commission has decided not to make such a recommendation.

2. An out-of-court statement should be admissible as evidence of the facts therein when no objection is made to its admission.
3. The judge should have discretion to exclude an out-of-court statement if it is of insufficient probative value or if its admission would operate unfairly against any party.
4. An out-of-court statement of a person should not be taken as corroboration of his testimony or that of any witness called to prove the making of the statement.
5. (1) An out-of-court statement of a witness should be admissible as evidence of any fact therein. However, unless the Court gives leave, no such statement should be given in evidence before the conclusion of the examination-in-chief of the witness who made it.
(2) Advance notice should be given of an out-of-court statement of a witness as of out-of-court statements of persons who do not testify.
6. (1) A witness should be entitled to refresh his memory, either before or at the time he testifies, by referring to any previous statement made either by him or another. Advance notice of such statement should be served on the other parties, who should then be at liberty to tender the statement as evidence of the facts therein. But where a witness refreshes his memory by reference to a statement made by another, the party calling the witness should not be entitled to put that statement in evidence unless it is otherwise admissible or unless the statement is read out during cross-examination.
(2) Cross-examination should not be permitted from statements in parts of a document used to refresh memory other than those parts actually used for that purpose unless the statements referred to in cross-examination are admissible in evidence in their own right.
7. Prior inconsistent statements of a witness should be admissible as evidence of the facts asserted at the instance of any party without any requirement that advance notice should be given to the other parties.
8. (1) 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:
 - (a) Any previous statement of a witness used in cross-examination should be made available to the other parties 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) A party producing a witness should not be permitted to give any evidence adverse to that witness's credibility except evidence of a previous inconsistent statement made by that witness

9 The following special provisions should be made for business and administrative records

- (1) An out-of-court statement contained in a business or administrative record should be admissible as evidence of any fact therein provided the court is satisfied that there is no person who was concerned in making the record who has any recollection of the facts stated therein
- (2) Whenever a fact is sought to be proved by reference to a statement contained in a business or administrative record, or produced from such a record, whether or not the information was collected or processed by any mechanical or electronic device, evidence must be given by a responsible person as to the reliability of the system of compiling those records and notice of such evidence given to the other party
- (3) Where a statement in a business or administrative record, or in a record produced from such a record, is not in a form comprehensible to a layman, an explanation by a qualified person should be admissible
- (4) The absence of a record should be evidence that an event did not happen where in the course of business a system has been followed to make or keep a record of the happening of events of a given description

- 10 (1) An out-of-court statement of a child who is not competent to give evidence should not be admissible
- (2) An out-of-court statement of a person who is not competent to testify as being of defective intellect or disturbed mind should not be admissible unless it is established that the maker of the statement would have been competent to testify when he made the statement

11 The out-of-court statements of persons entitled to diplomatic immunity who, not being compellable refuse to testify, should be admissible in the same way as those of a witness who being competent and compellable refuses to testify

12. (1) A party should be entitled to give in evidence against another party an admission made by that other party without giving advance notice and notwithstanding the fact that that other party does not testify, provided such an admission is proved by the best available evidence.

(2) An admission should be defined as any statement made by a party himself adverse to his interest in the proceedings and should include —

- (a) a statement not based on personal knowledge,
- (b) a statement of opinion,
- (c) a statement containing assumptions as to the law.

(3) Except in cases where conspiracy is alleged and there is independent evidence thereof, no statement made by any person other than the party himself should be admissible as an admission against that party.

(4) Where a party calls a witness who is an agent or servant of another party for the purpose of enabling an out-of-court statement of that witness to be received in evidence, the rules restricting cross-examination of one's own witness should be waived by the court.

Note: Recommendation 12(4) differs from the corresponding recommendation in the Working Paper. It proposed that

“where a party calls a witness who may be unfavourably disposed towards him for the purpose of enabling an out-of-court statement of that witness to be received in evidence, the rules restricting cross-examination of one's own witness should be waived by the court.”

On further consideration, the Commission is satisfied that it would be impractical to permit cross-examination of one's own witness in the somewhat vaguely defined circumstances there envisaged. It is considered, however, legitimate to permit such cross-examination in the special case of a witness who is an agent or servant of another party and who, accordingly, has a specific relationship with that party.

13. (1) No special provision should be made in the proposed legislation for out-of-court statements admissible under existing law as, for example, part of the *res gestae* or as public documents or published works.

(2) An out-of-court statement by a person as to his state of mind or feeling should be treated as an assertion of the facts stated therein and its admissibility subject to the same conditions as out-of-court statements generally.

14. Whenever an out-of-court statement as to reputation is to be given in evidence, particulars of the statement and the authority or grounds upon which it is based should be supplied to the other party in advance of the trial.

15. Out-of-court statements admissible by virtue of specific statutory provisions such as the *Bankers' Books Evidence Acts 1879 and 1959* should not be affected by the proposed legislation.

16. No witness should be cross-examined about statements which are inadmissible in evidence, whether or not such statements are read to the court in the course of cross-examination.

17. Where in any proceedings a party calls for or inspects a document which is in the possession or power of another party or of a witness called by that other party, his doing so should not entitle that other party to make the document evidence in the proceedings.

18. It should be permissible to give evidence of any matter impugning the credibility of the maker of an out-of-court statement proved in any proceedings if the matter could have been put to him in cross-examination for the purpose of impugning his credibility had he testified.

19. The admissibility of any statement now admissible as expert evidence should not be affected by the proposed legislation.

CHAPTER 5 GENERAL SCHEME OF A BILL TO REFORM
THE LAW RELATING TO THE ADMISSIBILITY
OF OUT-OF-COURT STATEMENTS IN
CIVIL CASES

- 1 (1) Provide that, save as provided in this statute or any other statutory provision, no statement other than one made while testifying by a person with personal knowledge of the facts stated shall be admissible as evidence of the facts therein

Note This section is a general statement of principle

- (2) Provide that "a statement" shall include any oral or written utterance whether or not it is intended to be assertive and any conduct which is intended to be assertive

Note This sub-section implements Recommendation 1(2)

- (3) Provide that for the purposes of this Act, a statement by a person as to his state of mind or feeling shall be deemed to be an assertion of the facts therein

Note This sub section implements Recommendation 13(2)

- 2 Provide that an out-of-court statement shall be admissible as evidence of any fact therein, provided the other party, upon being served with notice, does not object to its admission

Note This sub-section implements Recommendation 2

- 3 (1) Provide that an out-of-court statement shall be admissible as evidence of any fact therein, provided

(a) the maker and, where the maker had not personal knowledge of the facts stated, the person or persons from whom the information in the statement was derived testify in the proceedings or are dead or otherwise unavailable to testify,

(b) notice of the contents of the statement and evidence of the death or unavailability of the maker is served on the other parties, and

(c) the statement is proved by the best available evidence.

For the purpose of this sub-section a person shall be deemed to be unavailable to testify where he —

- (i) is unable to testify by reason of his health;
- (ii) cannot be identified or found;
- (iii) being competent or compellable, refuses to be sworn or to testify; or
- (iv) is outside the jurisdiction and it is not possible to obtain his evidence.

Note: This recommendation implements Recommendations 1 and 11.

(2) Provide that notwithstanding sub-section 1(b) no notice need be served of an out-of-court statement of a witness inconsistent with his testimony where that statement is tendered for the purpose of discrediting that testimony.

Note: This sub-section implements Recommendation 8.

(3) Provide that the requirement of notice may be waived at the discretion of the judge if the other party is not prejudiced by the absence of notice.

Note: This sub-section implements Recommendation 1(1)(b).

(4) Provide that, save with the leave of the court, an out-of-court statement of a witness shall not be tendered in evidence before the witness has testified.

Note: This sub-section implements Recommendation 5(1).

(5) Provide that, where evidence of reputation is tendered by any party, notice shall be given to the other party and shall include the grounds and authority upon which any statement as to reputation is based.

Note: This sub-section implements Recommendation 14.

4. Provide that an out-of-court statement is not admissible where it was made by a person at a time when that person was incompetent to testify on behalf of the party tendering the statement.

Note: This sub-section implements Recommendation 10.

5. (1) Provide that an out-of-court admission made by a party adverse to that party's interest in the proceedings shall be admissible as evidence of the facts therein.

Note: This sub-section implements Recommendation 12(1).

(2) Provide that, where conspiracy to commit a civil wrong is alleged against several parties and there is independent evidence implicating them, a statement made by one conspirator in

pursuance of the conspiracy is admissible as evidence of the facts therein against any other party in respect of whom conspiracy is alleged.

Note: This sub-section implements Recommendation 12(3).

(3) An admission admissible under this section shall be proved by the best available evidence.

Note: This sub-section implements Recommendation 12(1).

(4) No notice need be given of a statement admissible by virtue of this section.

(5) Where a party calls a witness who is an agent or servant of another party for the purpose of making an out-of-court statement of that person admissible in evidence, he shall be entitled to cross-examine that witness.

Note: This implements Recommendation 12(4).

(6) For the purposes of this section, an out-of-court statement made by a party adverse to his interest in the proceedings shall include —

- (a) a statement where the maker had not personal knowledge of the facts therein;
- (b) a statement of opinion;
- (c) a statement that contains assumptions as to the law.

Note: This definition sub-section implements Recommendation 12(2).

(7) No statement shall be admissible as an admission save in accordance with this Act.

6. (1) Provide that an out-of-court statement contained in a business or administrative record which is not admissible by virtue of section 3 shall be admissible as evidence of any facts therein, provided that evidence is given by a person occupying a responsible position in relation to such records showing that there is no person who was concerned in the compilation of the records who has personal knowledge of the facts therein, and that the records are reliable.

Note: This sub-section implements Recommendation 9(1).

(2) Provide that where a fact is sought to be proved by reference to a statement contained in a business or administrative record notice must be given to the other parties of the contents of the statement and of the evidence to be tendered in support of the reliability of the record.

Note: This sub-section implements Recommendation 9(2).

(3) Provide that, where production of a record described in subsection (1) would not convey to the court the information contained in the record by reason of its being kept in a form that requires explanation, an explanation of the record by a person qualified to make such an explanation is admissible in evidence under this section in the same manner as if it were the original record.

Note: This sub-section implements Recommendation 9(3).

(4) Provide that, where a business or administrative record does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the judge may, upon production of the record, admit it in evidence for the purpose of establishing that such matter did not occur or exist.

Note: This sub-section implements Recommendation 9(4).

7. Provide that, where an out-of-court statement of a person who is not called as a witness is given in evidence, there may be given in respect of that person, or of any person from whom he derived the information in the statement, —

- (a) any evidence which, if any such person had testified, would be admissible for the purpose of impugning or supporting his credibility as a witness; and
- (b) with the leave of the court, any evidence of any matter which, if any such person had testified, could have been put to him in cross-examination for the purpose of impugning his credibility as a witness.

Note: This section implements Recommendation 18.

8. (1) Provide that a witness may refresh his memory by reference to any writing or object, provided that notice is given to the other parties of the writing or object.

(2) Provide that, where a witness refreshes his memory by reference to a writing or object, that writing or object may be tendered in evidence at the request of any other party to the proceedings.

(3) Provide that statements used to refresh memory shall not, for that reason, be admissible as evidence of the facts therein at the instance of the party calling the witness whose memory has been refreshed.

(4) Provide that, where a witness refreshes his memory by reference to any document, a party shall not cross-examine him about a part of that document other than that used to refresh memory unless —

- (a) that part qualifies a statement which is used to refresh memory, or

(b) the statement in that part of the document is admissible in its own right as evidence of the facts therein.

(5) References to refreshing memory shall include refreshing memory before testifying or while testifying.

Note: This section implements Recommendation 6.

9. (1) Provide that a party shall not examine a witness about a statement that is inadmissible in evidence.

Note: This section implements Recommendation 16.

(2) Provide that where a party cross-examines a witness about a statement made or alleged to have been made by that witness —

(a) a copy of that statement or notice of its contents shall be furnished to the other party;

(b) notwithstanding (a), a witness may be cross-examined about a previous statement made by him without the full contents of that statement being shown to him at the time, provided that the circumstances and the contents of the statement are subsequently put to him so that he can make comment thereon;

(c) where a witness is cross-examined about a previous statement made by him, he shall be entitled to comment thereon and to explain any inconsistency between that statement and his testimony and, for this purpose, any previous statement explaining such inconsistency shall be admissible.

(3) Sections 3, 4 and 5 of the *Criminal Procedure Act 1865* are hereby repealed in their application to civil proceedings.

Note: Sub-sections 2 and 3 implement Recommendation 8.

10. Provide that where in any proceedings a party calls for or inspects a document which is in the possession or power of any other party or of a witness called by such party, his doing so shall not of itself entitle that other party to make the document evidence in the proceedings.

Note: This section implements Recommendation 17.

11. Provide that the judge may exclude an out-of-court statement tendered as evidence of the facts therein where he is of opinion that the probative value of the statement is too slight to justify its admission or that the admission of the statement would operate unfairly against any other party.

Note: This section implements Recommendation 1(3).

12. Provide that where corroboration is required by law, an out-of-court statement shall not be taken as corroboration of the testimony of the person who made it or of the testimony of the person who proves it in court.

Note: This section implements Recommendation 19.

13. Provide that nothing in this Act shall affect the admissibility of a statement by virtue of the law applicable to expert evidence.

Note: This section implements Recommendation 19.

14. Provide that nothing in this Act shall affect the admissibility of any evidence admissible by virtue of any other statutory provision.

Note: This section implements Recommendation 15.