

SCOTTISH LAW COMMISSION
(Scot Law Com No 149)



Evidence: Report on Hearsay Evidence in Criminal Proceedings

Laid before Parliament by the Lord Advocate under section 3(2) of the Law Commissions Act 1965

*Ordered by the House of Commons to be printed
22nd February 1995*

EDINBURGH: HMSO
£12.65

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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SCOTTISH LAW COMMISSION

Item 1 of our First Programme of Law Reform

Evidence: Report on Hearsay Evidence in Criminal Proceedings

To: The Right Honourable the Lord Rodger of Earlsferry, QC,
Her Majesty's Advocate

We have the honour to submit our Report on Hearsay Evidence in Criminal Proceedings

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KENNETH F BARCLAY, *Secretary*
13 December 1994

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Table of Abbreviations

CLRC	Criminal Law Revision Committee, Eleventh Report: Evidence (General) (1972, Cmnd 4991)
Cross	Cross on <i>Evidence</i> (7th edn, London, 1990, by the late Sir Rupert Cross and C Tapper)
Dickson	W G Dickson, <i>The Law of Evidence in Scotland</i> (3rd edn, Edinburgh, 1887, ed P J Hamilton Grierson)
DP	Scottish Law Commission Discussion Paper No 77, <i>Criminal Evidence: Affidavit Evidence, Hearsay and Related Matters in Criminal Proceedings</i> (1988)
Lewis	W J Lewis, <i>Manual of the Law of Evidence in Scotland</i> (Edinburgh and Glasgow, 1925)
Macphail	I D Macphail, <i>Evidence</i> (Edinburgh, 1987)
Renton and Brown	R W Renton and H H Brown, <i>Criminal Procedure according to the Law of Scotland</i> (5th edn, Edinburgh, 1983, ed G H Gordon, updated by supplements)
<i>Report on Children's Evidence</i>	Scottish Law Commission Report, <i>Report on the Evidence of Children and Other Potentially Vulnerable Witnesses</i> (1990) Scot Law Com No 125
<i>Report on Documentary Evidence</i>	Scottish Law Commission Report, <i>Evidence: Report on Documentary Evidence and Proof of Undisputed Facts in Criminal Proceedings</i> (1992) Scot Law Com No 137
Spencer and Flin	J R Spencer and R Flin, <i>The Evidence of Children: The Law and the Psychology</i> (2nd edn, London, 1993)
<i>Stair Memorial Encyclopaedia</i>	<i>The Laws of Scotland: Stair Memorial Encyclopaedia</i> (Edinburgh, 1987-)
Walker and Walker	A G Walker and N M L Walker, <i>The Law of Evidence in Scotland</i> (Edinburgh and Glasgow, 1964)

Part I Introduction

The background to this Report

1.1 This Report is one of a series of reports on topics in the law of evidence, a subject included in our First Programme of Law Reform.¹ In 1980 we published a Consultative Memorandum² which reviewed many areas of the law of evidence and invited comments on a wide range of proposals for reform. Thereafter, however, we decided not to produce one large report on the law of evidence but instead to prepare a series of reports on particular areas of the law which appeared to merit examination with a view to possible reform. We have accordingly published reports on *Evidence in Cases of Rape and Other Sexual Offences*,³ on *Corroboration, Hearsay and Related Matters in Civil Proceedings*,⁴ on *Blood Group Tests, DNA Tests and Related Matters*,⁵ on *The Evidence of Children and Other Potentially Vulnerable Witnesses*,⁶ on *Protection of Family Mediation*⁷ and on *Documentary Evidence and Proof of Undisputed Facts in Criminal Proceedings*.⁸ We considered isolated rules of evidence in our reports on *Requirements of Writing*⁹ and *Formation of Contract*¹⁰ and in our discussion paper on *Contract Law: Extrinsic Evidence, Supersession, and the Actio Quanti Minoris*.¹¹

1.2 In 1988 we published a discussion paper on *Affidavit Evidence, Hearsay and Related Matters in Criminal Proceedings*.¹² We are grateful to all those who responded to the Discussion Paper. Their names are listed in Appendix B.

1.3 The issues which were addressed in the Discussion Paper were: (1) the admission of evidence by affidavit; (2) the rule against hearsay; (3) the admissibility of prior statements of witnesses and accused persons; (4) computer and other machine-generated evidence; and (5) miscellaneous matters relative to documentary evidence. We considered the first, fourth and fifth topics in our Report on *Documentary Evidence and Proof of Undisputed Facts in Criminal Proceedings*.¹³ The admissibility of prior statements of witnesses was the subject of recommendations in our report on *The Evidence of Children and Other Potentially Vulnerable*

¹ (1965) Scot Law Com No 1.

² Consultative Memorandum No 46, *Law of Evidence*.

³ (1983) Scot Law Com No 78, implemented by s 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

⁴ (1986) Scot Law Com No 100, implemented with modifications by the Civil Evidence (Scotland) Act 1988.

⁵ (1989) Scot Law Com No 120, implemented by s 70 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and by s 28 of the Prisoners and Criminal Proceedings (Scotland) Act 1993.

⁶ (1990) Scot Law Com No 125, implemented in part by ss 56, 59 and 60 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and by ss 33-35 of the Prisoners and Criminal Proceedings (Scotland) Act 1993.

⁷ (1992) Scot Law Com No 136.

⁸ (1992) Scot Law Com No 137, implemented in part by the Prisoners and Criminal Proceedings (Scotland) Act 1993, s 29 and Sched 3.

⁹ (1988) Scot Law Com No 112.

¹⁰ *Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods* (1993) Scot Law Com No 144.

¹¹ (1994) DP No 97.

¹² DP No 77 (hereafter referred to as "the Discussion Paper" in the text and "DP" in the footnotes).

¹³ (1992) Scot Law Com No 137. See para 1.1 above, 8th footnote.

*Witnesses.*¹⁴ For the purposes of this Report we have undertaken a comprehensive re-examination of the rule against hearsay and the admissibility of prior statements of witnesses and accused persons. We have done so in the light of the comments submitted and further research. In particular we have studied the publications of many law reform bodies and a large quantity of valuable academic writing on the reform of the hearsay rule. This Report now exhausts the subject-matter of the Discussion Paper.

Structure of this Report

1.4 In Part II of this Report we consider the principles which in our view should guide the reform of the law of evidence in criminal proceedings. In Part III we discuss the rule against hearsay, and in Part IV the policies which should be adopted in reforming the rule in criminal proceedings. In Part V we examine the exceptions to the rule against hearsay in the strict sense, that is, the rule that assertions by persons other than the witness who is testifying are inadmissible as evidence of the facts asserted. We recommend that the exceptions to this rule should be rationalised and extended so that hearsay evidence of statements will be admissible provided that the evidence of the maker of the statement is unavailable for any of a number of specified reasons. Part VI is concerned with the rules of practice and procedure which should apply when a party wishes to rely on any of the exceptions recommended in Part V. In Part VII we consider the exceptions to the rule that the previous assertions of the witness who is testifying are inadmissible as evidence of the facts stated. We propose that such assertions should be admissible for that purpose if certain conditions are satisfied. Our recommendations for reform are summarised in Part VIII. A draft Bill to give effect to our recommendations, together with explanatory notes, appears in Appendix A.

¹⁴ (1990) Scot Law Com No 125, paras 4.45-4.70, Recommendations 18 and 19, draft Bill, cl 8 (not implemented).

Part II Principles of reform of the rules of criminal evidence

Introduction

2.1 This Report is concerned with the reform of important rules of the law of evidence in criminal proceedings. These rules are concerned with the admissibility as evidence of statements made other than by a witness giving evidence in court. Such evidence is generally referred to as "hearsay". At common law there is a general rule against hearsay, to the effect that such a statement is generally inadmissible in order to establish the truth of what is contained in it. In Parts V and VI we shall consider that rule as it applies to statements made by persons whose evidence cannot be made available to the court. In Part VII we shall consider the rule as it applies to statements which have been made by witnesses before they give evidence in court: this is sometimes expressed as a separate rule that a prior statement of a witness who is giving evidence is inadmissible as evidence of the truth of its contents. In this Part and in Parts III and IV, however, we shall refer generally to "hearsay" and discuss a number of general issues which are common to Parts V, VI and VII.

2.2 In this Part we shall try to identify valid general principles which may indicate the directions which any reform of the law of evidence in criminal proceedings should take. We shall discuss the proper function of a law of evidence,¹ and the nature and purposes of civil and criminal proceedings.² We shall also draw attention to the essential features of the Scottish criminal trial system and to the limits which they place upon the reform of the law of evidence.³ Finally, we shall attempt to formulate a few guiding principles.⁴

General principles

2.3 The Consultative Memorandum of 1980 expressed the view that the object of all reform in the area of the law of evidence, whether in the long or the short term, must be "to make the law of evidence, so far as possible, an intelligible and coherent whole". To that end this Commission "tried to bring to bear certain guiding principles, which in its opinion should govern any discussion of the law of evidence, on its consideration of that law in its present state".⁵ The Commission then stated five principles, three of which are relevant to the reform of the hearsay rule:

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

¹ See paras 2.4-2.7 below.

² See paras 2.8-2.12 below.

³ See paras 2.13-2.25 below.

⁴ See paras 2.26-2.31 below.

⁵ Consultative Memorandum No 46, para A.03.

- (3) The rules of evidence in civil and criminal proceedings should be identical unless there is good reason to the contrary.⁶

We were influenced by principles (1) and (2) when we formulated the recommendations in our Report on Corroboration, Hearsay and Related Matters in Civil Proceedings.⁷ We consider that it would now be appropriate to re-examine those three principles in the light of further experience.

The proper function of a law of evidence

2.4 The first principle was that the law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence. The principle that the law should be simplified needs no justification. It is the statutory duty of the Law Commissions to keep the law under review "with a view to its systematic development and reform, including ... generally the simplification and modernisation of the law".⁸ Simplification of the law of evidence is particularly desirable. In a criminal trial an objection to a question or a line of evidence may have to be taken instantly by an advocate⁹ and disposed of by the judge without a satisfactory opportunity to consider the authorities. Again, when charging the jury the judge should be able to give them directions as to the rules of evidence they must apply in terms which they can readily understand and accept as reasonable.¹⁰

2.5 The concluding words of the first principle, however, raise the fundamental question, What is the proper function of a law of evidence? A simple answer is that where a court or tribunal has to decide a disputed issue of fact it is the proper function of the law of evidence to assist it by providing intelligible and acceptable rules which will indicate what evidence it may receive in order to elucidate the truth in relation to the matter in dispute. The rules of procedure may be said to have a similar function: they guide the court or tribunal as to the means by which it must arrive at its decision. Indeed, although the rules of evidence and procedure are conventionally regarded as separate subjects by teachers of law and writers of textbooks, in practice they are so closely related that it would be artificial to segregate them in separate compartments when considering the reform of the law.

2.6 If, as we have suggested, it is the function of both the rules of evidence and the rules of procedure to guide to a correct decision the court or tribunal which has to apply them, then in order to decide whether a particular rule of evidence is fulfilling that function it is necessary to discover the nature and purpose of the proceedings before the court or tribunal. It is not enough to say that any court or tribunal is concerned to ascertain the truth. Different courts and tribunals have different functions and seek the truth about different issues; and in recent years Parliament, by prescribing for them differing rules of evidence and procedure, has made it very clear that they may seek the truth by different means. Thus, in civil proceedings generally, both the requirement of corroboration and the rule against

⁶ The principle numbered (3) above was numbered (5) in the Consultative Memorandum. Its third principle related to the admissibility of contemporaneous reports of events written in the course of a person's work, and the fourth to the competence and compellability of witnesses.

⁷ (1986) Scot Law Com No 100, para 1.3.

⁸ Law Commissions Act 1965, s 3(1).

⁹ In this Report we mean by "advocate" any legal representative, whether he or she is a member of the Faculty of Advocates or a solicitor (with or without extended rights of audience), or prosecuting or defending.

¹⁰ Criminal Law Revision Committee, Eleventh Report: Evidence (General) (1972, Cmnd 4991) (hereafter "CLRC"), para 25.

hearsay have been abolished, and there are special rules about documentary evidence.¹¹ In small claim procedure in the sheriff court, the rules relating to admissibility of evidence are not binding.¹² Whether a particular tribunal is bound by the rules of evidence depends upon the interpretation of the provisions which constitute or regulate it.¹³ Industrial tribunals are not bound by rules as to evidence on oath or affirmation¹⁴ or as to the admissibility of evidence,¹⁵ and the Lands Tribunal for Scotland is not strictly bound by all the courtroom rules of evidence.¹⁶

2.7 The consideration that different courts and tribunals have different objectives, are concerned with different issues and accordingly apply different rules of evidence and procedure suggests to us that it may no longer be appropriate to desiderate, as our predecessors appeared to do, that there should be a single law of evidence, "an intelligible and coherent whole",¹⁷ applicable across the board to all types of proceedings with only a minimum of essential exceptions and modifications.¹⁸ We therefore doubt whether it is helpful to maintain as a general principle that "the rules of evidence in civil and criminal proceedings should be identical unless there is good reason to the contrary".¹⁹ We now explore this question further by considering the nature and purposes of civil and criminal proceedings.

The nature and purposes of civil and criminal proceedings

2.8 The primary objective of a criminal trial is to determine whether an individual is guilty of a charge brought against him by the State.²⁰ Thus, in any criminal trial there are two competing interests which the rules of criminal evidence and procedure must attempt to reconcile. These interests are sometimes represented as those of the State and of the individual. It seems to us to be equally helpful to regard them as two competing public interests: the public interest in the enforcement of the criminal law by the conviction of the guilty, and the public interest in avoiding the erroneous conviction of the innocent.²¹ It is clear that wrongful acquittals or convictions not only affect the persons concerned but may also sap public confidence in the criminal justice system. Accordingly, the rules should maintain public confidence by preventing, as far as possible, any miscarriage of justice.²² While neither the conviction of an innocent accused nor the acquittal of a guilty one may be described as a just result, the former is traditionally and, we think, rightly regarded as the

¹¹ Civil Evidence (Scotland) Act 1988, ss 1-7.

¹² Sheriff Courts (Scotland) Act 1971, s 35(3) (added by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 18(1)).

¹³ See *Halsbury's Laws of England* (4th edn) vol 17, para 3.

¹⁴ *Douglas v Provident Clothing & Supply Co Ltd* 1969 SC 32, 1969 SLT 57.

¹⁵ Industrial Tribunals (Rules of Procedure) (Scotland) Regulations 1985, SI 1985/17, reg 3(1), Sch 1, r 8(1).

¹⁶ Lands Tribunal for Scotland Rules 1971, SI 1971/218, rr 20, 23; *Gibbon v Inland Revenue* 1980 SLT (Lands Tr) 3.

¹⁷ See para 2.3 above.

¹⁸ W Twining, *Rethinking Evidence* (1990), pp 129, 183, 213 fn 18.

¹⁹ See para 2.3 above.

²⁰ In Scotland private prosecutions are competent but extremely rare: *X v Sweeney* 1982 JC 70, 1982 SCCR 161 (*sub nom H v Sweeney*) 1983 SLT 48; *McDonald v HMA* 1988 SLT 713, (*sub nom McDonald v LA*) 1988 SCCR 239.

²¹ W Twining, *Rethinking Evidence* (1990), p 186.

²² A A S Zuckerman, *The Principles of Criminal Evidence* (1989), pp 1-6; "Miscarriage of Justice and Judicial Responsibility" [1991] Crim L R 492 at pp 492-493.

more serious miscarriage of justice.²³ The essence of the matter is expressed in these terms by Lord Emslie:²⁴

"In all our criminal courts in Scotland the object of trial is to enable the Crown to secure the conviction of the guilty by proof beyond reasonable doubt upon evidence sufficient in law; and at the same time to ensure that the protection which the law seeks to afford to the innocent is denied to none. What is at stake in a criminal trial is the interest of the community, and it must never be forgotten that that interest requires of a civilised system of criminal law - which the law of Scotland undoubtedly is - that even if its administration results in the acquittal from time to time of the apparently guilty it should involve the minimum of risk at any time of the conviction of the innocent. Some may nowadays be heard to say that the protection which our law affords to the accused is too great and that it should be reduced to simplify the conviction of the criminal. The arguments of the advocates of change are familiar but, in my opinion, no change deserves serious consideration, in spite of the laudable object, if the result of its adoption would be to increase to any significant extent the risk of the conviction of the innocent. If an increased risk of convicting the innocent is the price of a greater prospect of convicting the guilty, then so far as I am concerned it is a price which no sound and just system of law can seriously afford to pay."

2.9 Many of the general rules of evidence and procedure in criminal cases are designed to take account of these considerations. The Crown is obliged to produce corroborated evidence and prove the guilt of the accused beyond reasonable doubt. The accused is not obliged to give evidence or, unless he relies on one of the special defences or intends to incriminate a co-accused, to reveal his defence in advance of the trial. There are strict controls over the admissibility of evidence of his past misconduct, of alleged confessions and of evidence illegally or irregularly obtained.

2.10 The objective of civil proceedings, on the other hand, is to resolve disputes which are not generally concerned with the protection of the individual from punishment or of the community from crime. The general rules of evidence and procedure in civil cases are therefore different from those in criminal trials in many respects. Either party may recover relevant information from the other. Each discloses his case to the other in written pleadings, and each is a compellable witness for the other. A party has to prove his case on a balance of probabilities, a lesser standard than proof beyond reasonable doubt. The difference in the nature of the issues and, perhaps, the consideration that generally in civil cases the evidence is assessed and the facts are found by a judge and not by a jury,²⁵ justify the recent abolition of the requirement of corroboration and of the rule against hearsay in civil proceedings.²⁶

²³ *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 per Lord Reid at p 278; P Stein and J Shand, *Legal Values in Western Society* (1974), p 82; Glanville Williams, *The Proof of Guilt* (3rd ed, 1963), pp 186-187. Cf the much-criticised view of the CLRC: "It is *as much* in the public interest that a guilty person should be convicted as it is that an innocent person should be acquitted" (para 27, emphasis supplied), commented on by, among many others, Sir Brian MacKenna, "Criminal Law Revision Committee's Eleventh Report: Some Comments" [1972] Crim L R 605.

²⁴ Lord Emslie, "The Role of Judges in Society in Scotland" (1974) 19 JLS 205 at p 208.

²⁵ The significance of the role of the jury in relation to the reform of the rules of evidence is discussed in paras 2.20-2.25, 3.10-3.12 below.

²⁶ Civil Evidence (Scotland) Act 1988, ss 1, 2.

2.11 We therefore consider that there are compelling reasons why the abolition of these rules should not be extended to criminal proceedings.²⁷ The Criminal Law Revision Committee, on the other hand, considered that the fact that hearsay evidence had become widely admissible in civil proceedings in England under the Civil Evidence Act 1968 was a fresh argument in favour of allowing such evidence in criminal proceedings. Not only did it seem to them desirable in general that the law of evidence in civil and criminal proceedings should be as nearly alike as possible (although they admitted that there were bound to be substantial differences) but they considered that it would be particularly unfortunate if differences in the law were to lead to different results in proceedings relating to the same facts. They observed that it was possible, in theory at least, that a person might be sued for fraud and be found not liable on the strength of hearsay evidence admissible under the Act of 1968 and yet be convicted of a criminal offence owing to the inadmissibility of similar evidence in criminal proceedings.²⁸

2.12 We take a different view. Clearly there are certain rules and concepts in the law of evidence which are common to civil and criminal proceedings, such as relevancy as a necessary condition of admissibility, the concept of imposing upon a party a burden of proof of particular issues, certain privileges to withhold evidence on grounds of confidentiality or public policy, and the distinctions between the credibility and reliability of witnesses and the admissibility and weight of evidence. It would therefore be mistaken to propose that the law of evidence in civil and criminal cases should be completely different. But the distinctions between the two types of proceedings appear to us to be so marked that it seems justifiable to contemplate that in certain areas, such as hearsay, there should be special rules for each. We have formed the view that it would very seldom be a consequence that different results might be reached in proceedings relating to the same facts, and that that consideration is outweighed by the desirability of so fashioning the laws of evidence applicable in civil and criminal proceedings that in the great majority of cases they will reflect the nature and serve the purposes of the proceedings in which they operate.

The constraints of the Scottish criminal trial system

2.13 We proposed above²⁹ that the rules of evidence in criminal cases should reflect the nature and serve the purposes of the criminal trial. It is a corollary of that proposition that the nature and purposes of the trial impose certain constraints on the extent to which the rules of evidence may be reformed. We consider the nature of these constraints in the following paragraphs.

Values other than the pursuit of truth

2.14 It is sometimes maintained that the object of leading evidence in a criminal trial is, or should be, the elucidation of the truth.³⁰ That statement, however, requires considerable qualification. First, the matter to be elucidated is not the whole truth about all the circumstances of the events narrated in the libel, but only the question whether the Crown has proved beyond reasonable doubt that the accused committed the crime charged against

²⁷ During the Parliamentary Debates on the Bill which became the Civil Evidence (Scotland) Act 1988, the view was frequently expressed that there should be no such extension: HC Deb vol 133, cols 758-760, 766, 772; vol 136, col 737; First Scottish Standing Committee, vol XI, 21 June 1988, cols 64, 65.

²⁸ CLRC, para 235.

²⁹ See para 2.12 above.

³⁰ *Muldoon v Herron* 1970 JC 30, 1970 SLT 228 per L J-C Grant at pp 36, 232, Lord Wheatley at pp 40, 234.

him. While a verdict of "guilty" answers that question in the affirmative, a verdict of "not guilty" or "not proven" only means that that question has not been so answered: it is not a determination of the accused's innocence. And whatever the verdict, it may not reflect the truth. Secondly, if the elucidation of the truth were the sole object of the trial, the judge would be empowered to call and question witnesses on his own initiative, and all the evidence relevant to the circumstances of the crime would be admitted including the accused's character, hearsay and irregularly obtained evidence, including confessions unfairly extracted from the accused; and he, and anyone who knew anything about the circumstances of the crime, would be obliged to give evidence irrespective of any claims to privilege on grounds of self-incrimination or confidentiality.

2.15 In fact, however, the criminal trial is not an exercise in which the truth is pursued at all costs. It is rather a serious attempt to reach a conclusion on the question whether the accused's guilt has been proved beyond reasonable doubt, which is quite deliberately impeded by a number of considerations independent of, or even inimical to, the objective of reaching a correct conclusion on that question. Many of these considerations are reflected in the rules of evidence. Some relevant evidence is excluded in deference to such principles as moral obligation (confidential communications), unreliability (certain categories of hearsay)³¹ and, above all, fairness to the accused. As to the latter, there are many rules which reflect assumptions as to how individuals should be treated by a civilised system of criminal justice and, in particular, protected against the risk of erroneous conviction. Thus, as we have already noted,³² there are strict controls over the admissibility of evidence of the accused's past misconduct, of alleged confessions and of evidence illegally or irregularly obtained. In addition to these rules excluding relevant evidence which, if admitted, might increase the risk of wrongful conviction, there are the further rules that in proof of the essential facts of the case against him the Crown must produce corroborative evidence and prove his guilt beyond reasonable doubt. The accused is further protected by not being obliged to give evidence or, unless he relies on one of the special defences or intends to incriminate a co-accused, to reveal his defence in advance of the trial. Further, on any issue where he has the burden of proof, he may discharge it on the lower standard of the balance of probabilities.

2.16 All these impediments to the ascertainment of the truth exist because of a concern for the individual's rights, an acknowledgement of the serious consequences of conviction and a desire to safeguard the trial process against the risk of human fallibility, both in the perception, memory and powers of expression of the witnesses and in the assessment of their evidence by the tribunal of fact, whether that is a jury or a judge or judges in a summary criminal court. It appears to us that in any reform of the law of evidence these are considerations which are of fundamental importance.

2.17 In relation to the hearsay rule a primary question must be whether any proposed reform would increase the likelihood of a correct verdict by making available to the court potentially valuable evidence which either is favourable to the accused or, if unfavourable, may be adduced without prejudicing his legitimate rights; or whether the effect of the reform would be to increase the risk of an erroneous conviction and thus unfairly prejudice the accused, either by diminishing his rights or by allowing the prosecution to adduce against him evidence which is unreliable and likely to mislead the tribunal of fact.

³¹ The validity of the assumption that these categories of hearsay are so unreliable that they should be excluded is examined later in this Report: see paras 3.5-3.7, 3.20-3.21, 4.47 below.

³² Para 2.9 above.

Implications of the adversarial system

2.18 As far as the leading of evidence is concerned, the Scottish criminal trial may be conveniently described as having adversarial features.³³ It is for each party to decide what evidence he will adduce, and for his opponent to decide whether to object to the admission of any evidence tendered or to challenge by cross-examination any evidence admitted; and it is for the judge to deal with any questions of law which arise and, in a jury trial, to direct the jury as to the rules of law, including the rules of evidence, which they must apply in reaching their verdict. While the judge is entitled to question the witnesses called by the parties, he cannot call witnesses himself. He is not given any information about the case or the accused before the trial and, with one important exception, has no discretion to exclude admissible evidence.³⁴

2.19 Certain of those adversarial features of the Scottish criminal trial make it necessary to consider four important issues in relation to any proposed reform of the rules of criminal evidence generally, and of the hearsay rule in particular: the significance of the jury; the maintenance of a proper balance between the Crown and the defence; the right of the accused to challenge the evidence against him by cross-examination; and the extent to which the judge should have a discretion to control the admission of evidence. It will be convenient to examine the significance of the jury in the following paragraphs, and to consider the other issues in Parts III and IV.

The significance of the jury

2.20 An important feature of the Scottish criminal justice system is that the most serious cases are tried by jury. Other cases are tried summarily, either by a sheriff sitting alone, or in the district court. There are difficult questions as to how far the existence of the jury should have a bearing on proposals for the reform of the law of evidence in criminal cases. Should the same rules of evidence apply to jury trials and to summary trials? Could different rules as to hearsay be justified on the ground that a jury would be less experienced and expert than a judge in applying the rules and weighing the evidence? Again, when reforms are contemplated, the ability of a jury to understand the present rules and the proposed rules should, ideally, be evaluated. It would be very useful, if not essential, to know how well juries understand and apply the judge's directions on matters of law and how adequately they assess the evidence led before them.

2.21 These issues are particularly relevant to the reform of the rule against hearsay for two reasons. First, the rule against hearsay is among the most important of many exclusionary rules of evidence which are designed to disallow the admission of particular categories of evidence, however relevant and persuasive.³⁵ One justification of the rule against hearsay, which we shall consider in Part III, is that juries would be unable to evaluate hearsay accurately. Secondly, where the rule against hearsay or the rules concerning a witness's prior statements allow hearsay evidence to be led for a limited purpose, the judge is required to give the jury directions about the relevant rule. Because of

³³ It would be misleading to describe Scottish or Anglo-American systems of criminal justice as wholly adversarial and those of certain jurisdictions of continental Europe as wholly inquisitorial: most are hybrids. See *Criminal Procedure Systems in the European Community* ed C van den Wyngaert (1993); *Report of the Royal Commission on Criminal Justice* (1993), Cm 2263, pp 3-4, paras 11-15.

³⁴ The role of the judge is considered further in paras 4.33-4.46 below.

³⁵ See para 2.15 above.

the nature of the rule, juries may find the judge's directions complex and difficult to understand. Where two accused are tried together and evidence is led of a statement by one accused in which he incriminates the other, as a general rule the judge must direct the jury that the statement is not evidence against the other accused.³⁶ If evidence is led of a complainer's statement made shortly after the alleged crime, the jury must be directed that it is admissible to enhance his or her credibility, but not to prove the truth of the statement.³⁷ The same rule applies to evidence of a witness's previous consistent statement, admitted to rebut an allegation of inconsistency.³⁸ Similarly, a witness's previous inconsistent statement is admissible to diminish his or her credibility but not to prove the truth of what he or she said on the previous occasion.³⁹

2.22 The system of jury trial operates on the assumption that the jury understands the judge's directions and implicitly obeys them.⁴⁰ Accordingly, where admissible hearsay evidence has been led, the jury is expected to be able to grasp technical directions of the kind we have just mentioned. On the other hand, one of the reasons why other hearsay evidence is inadmissible is that it is assumed that the jury would have insufficient intellectual capacity to evaluate it even with the judge's help.

"Thus the jury are credited with the ability to follow the most technical and subtle directions in dismissing evidence from consideration, while at the same time they are of such low-grade intelligence that they cannot, even with the assistance of the judge's observations, attach the proper degree of importance to hearsay."⁴¹

It is impossible to test the validity of such assumptions, since research is prohibited by section 8 of the Contempt of Court Act 1981. Some scholars have called for research into the ways in which juries and magistrates assess evidence, and into the effect on juries of judicial warnings;⁴² and the Royal Commission on Criminal Justice has recommended that section 8 should be amended to enable research to be conducted into juries' reasons for their verdicts "so that informed debate can take place rather than argument based only on surmise and anecdote".⁴³ One commentator has observed:

"Where a Royal Commission has to make policy proposals based on guesswork, the case for law reform is unanswerable."⁴⁴

2.23 It may be debatable whether research could determine how efficiently jurors evaluate evidence or how well they understand and apply the judge's directions on the rules of evidence which are relevant to their deliberations.⁴⁵ In other jurisdictions, however,

³⁶ *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 10 (hereafter "10 Stair Memorial Encyclopaedia") para 726.

³⁷ *Ibid*, para 707.

³⁸ *Coyle v HMA* 1994 SLT 1333, *sub nom C v HMA* 1994 SCCR 560.

³⁹ 10 *Stair Memorial Encyclopaedia* para 708.

⁴⁰ *Stewart v HMA* 1980 JC 103 at p 110, 1980 SLT 245 at pp 250-251; *Russell v HMA* 1992 SLT 25 at p 26, 1991 SCCR 790 at p 794; *Blance v HMA* 1992 SCCR 470 at pp 474-475; *Pullar v HMA* 1993 SCCR 514 at p 522; *Gray v HMA* 1994 SLT 1237 at p 1243, 1994 SCCR 225 at p 234.

⁴¹ Glanville Williams, *The Proof of Guilt* (3rd ed, 1963), p 207.

⁴² A Ashworth and R Pattenden, "Reliability, hearsay evidence and the English criminal trial" (1986) 102 LQR 292 at p 331.

⁴³ *Report* (1993, Cm 2263), chap 1, p 2, para 8; recommendation 1, p 188.

⁴⁴ D Pannick, "Juries must stand up and be counted" *The Times* 17 August 1993.

⁴⁵ For accounts of recent experiments with mock jurors see S Landsman and R F Rakos, "Research essay: a preliminary empirical enquiry concerning the prohibition of hearsay evidence in American courts" (1991) 15 *Law and Psychology Review* 65; P Miene, R C Park and E Borgida, "Juror decision making and the evaluation of hearsay evidence" (1992) 76 *Minnesota Law Review* 683.

studies have revealed a large number of difficulties in the comprehensibility of common judicial language. These difficulties, it is said, raise serious doubts as to whether juries fully understand some of the directions in law they are given.⁴⁶ Other research is said to suggest "that some juries are capable of responding appropriately to directions, although the results vary".⁴⁷

2.24 In the absence of reliable data, some reformers proceed on the basis of their own assumptions as to the abilities of the jury. In the foreword to the American Law Institute's *Model Code of Evidence* Professor Edmund M Morgan wrote:

"Of course, the truth is that the jurors are neither so foolish as some of the rules they are supposed to follow, nor so wise or able as other rules assume them to be. When they enter the jury-box, they do not lose their common sense, nor do they acquire new capacities or new wisdom. They cannot cast aside all the previous experiences of their lives; they endeavor to solve the problems put to them as they would do in like situations out of court; and they succeed in doing so with reasonable efficiency except when hindered by artificial rules of procedure and evidence."⁴⁸

In England, the Criminal Law Revision Committee said:

"We disagree strongly with the argument that juries and lay magistrates will be over-impressed by hearsay evidence and too ready to convict or acquit on the strength of it. Anybody with common sense will understand that evidence which cannot be tested by cross-examination may well be less reliable than evidence which can. In any event judges will be in a position to remind juries that the former is the case with hearsay evidence, and sometimes the judge may think it advisable to mention this to the jury at the time when the statement is admitted. On the other hand there is some hearsay evidence which would rightly convince anybody. Moreover, juries may have to consider hearsay evidence which is admissible under the present law, and there are other kinds of evidence which they may find it more difficult to evaluate than hearsay evidence - for example, evidence of other misconduct."⁴⁹

The assumptions of these reformers, however, are as untested as the traditional assumptions which underlie the present law.

2.25 We do not propose to make any assumptions about the abilities of juries, or "to make policy proposals based on guesswork". We shall attempt to identify principles of reform which are valid irrespective of the standard of juries' abilities. Indeed judges in summary criminal courts, although they understand the rules of evidence, may sometimes have difficulty in carrying out the mental exercises which the rules require. In our present state of ignorance as to how juries and summary judges reach their decisions on questions of fact, there seems to us to be no justification for having different rules of evidence for jury and non-jury trials.

⁴⁶ New South Wales Law Reform Commission, *The Jury in a Criminal Trial* (LRC 48, 1986), para 6.30.

⁴⁷ Law Reform Commission of Australia, *Evidence* (ALRC 26 (Interim) 1985), vol 1, para 75.

⁴⁸ *Model Code of Evidence* (American Law Institute, 1942), p 10.

⁴⁹ CLRC, para 247. Where the accused has admitted previous convictions in cross-examination under s 141(1)(f)(ii) of the Criminal Procedure (Scotland) Act 1975, the judge directs the jury not to infer from the convictions that the accused is the kind of man who would commit the crime charged, but simply to bear his convictions in mind when assessing the credibility of his evidence.

Restatement of general principles

2.26 We now attempt to restate the general principles on which the law of evidence in criminal proceedings should be reformed.⁵⁰

Clarity and simplicity

2.27 The first principle identified in the Consultative Memorandum of 1980 was that the law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence. We think that this principle could with advantage be separated into two parts. First, *the rules of evidence should be as clear and simple as possible*. We have already emphasised the need for simplification.⁵¹ It should be added that it has been the experience of reformers of the law of evidence in other jurisdictions that it is impossible to avoid some degree of technicality and complexity. If, however, the rules are not immediately comprehensible to a lay person, they should at least be readily understandable to the judiciary and legal practitioners, and should be capable of explanation by them to juries and clients.

Nature and purpose of the trial

2.28 Secondly, *the rules of evidence should reflect the nature and serve the purpose of the criminal trial*. We refer to our discussion of "the proper function of a law of evidence" in the foregoing paragraphs.⁵² The criminal trial is an inquiry which is adversarial in nature and its purpose is to determine whether an individual is guilty of a charge brought against him by the State. The inquiry is circumscribed, however, by rules which express values other than the pursuit of truth.⁵³ Further, the trial process must avoid as far as possible any miscarriage of justice, whether through the acquittal of the guilty or the conviction of the innocent, although the latter is a graver error than the former.⁵⁴

2.29 On a practical level, the purpose of the trial should be achieved with all reasonable speed and economy. As we have mentioned, in a criminal trial an objection to a question or a line of evidence may have to be taken instantly by an advocate and disposed of by the judge without a satisfactory opportunity to consider the authorities.⁵⁵ The rules of evidence should not be so uncertain as to bring about in many cases protracted legal debates or trials-within-trials in order to determine whether a proposed item of evidence is admissible. Accordingly *the rules of evidence should seek to achieve reasonable expedition, the avoidance of needless expense and a reasonable degree of certainty*.

Relevance and admissibility

2.30 The Consultative Memorandum's Second Principle was that as a general rule all evidence should be admissible unless there is a good reason for it to be treated as inadmissible. Here, "all evidence" must mean "all relevant evidence". In other words,

⁵⁰ In the following paragraphs we draw on the work of many law reform bodies, especially the Law Reform Commission of Australia's *Issues Paper: Reform of Evidence Law* (ALRC IP 3 1980) chap 6.

⁵¹ See para 2.4 above.

⁵² See paras 2.5-2.25 above.

⁵³ See paras 2.14-2.17 above.

⁵⁴ See para 2.8 above.

⁵⁵ See para 2.4 above.

irrelevant evidence should be inadmissible, but *all relevant evidence should be generally admissible*. "The basic axiom of any rational fact-finding process must be that all information relevant in determining the issues is admissible".⁵⁶ Such information should be excluded only for strong reasons. In Thayer's classic formulation:

"The two leading principles should be brought into conspicuous relief, (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it."⁵⁷

2.31 Having attempted to restate these general principles, we shall try in Part IV to apply them when devising policies for the reform of the rules of evidence with which this Report is concerned.

⁵⁶ Law Reform Commission of Canada, *Report on Evidence* (1977), p 52.

⁵⁷ J B Thayer, *A Preliminary Treatise on Evidence at Common Law* (1898), p 530, *cit Weinstein's Evidence* (1994), p 402-6. See also Cross on *Evidence* (7th edn, 1990, by the late Sir Rupert Cross and C Tapper, hereafter "Cross"), p 51: "The main general rule governing the entire subject [of evidence] is that all evidence which is sufficiently relevant to an issue before the court is admissible and all that is irrelevant, or insufficiently relevant, should be excluded."

Part III The hearsay rule

Introduction

3.1 In this Part we briefly explain the hearsay rule and examine the reasons for and against the application of the rule in criminal proceedings.

The hearsay rule

3.2 The rule against hearsay has been formulated as follows:¹

"Any assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion asserted."

The term "hearsay" is misleading since the rule applies not only to statements² made orally but also to statements made in documents³ and to statements made by means of conduct such as signs or gestures: all are inadmissible as evidence of the truth of the matters stated, unless an exception to the rule applies. In the following paragraphs we shall generally refer only to statements which have been made orally, but we shall do so for convenience: we do not intend to imply any difference in principle between statements made orally and statements made in documents or by conduct.

3.3 The rule is qualified by a number of exceptions, both at common law and by statute. The principal common law exceptions are statements made by persons who have died before the trial, statements forming part of the *res gestae*, certain statements made by the accused and, in certain circumstances, statements made in the presence of the accused and statements by witnesses identifying the accused. There are also other common law exceptions, for some of which there is little judicial authority.⁴ There are further exceptions in favour of statements in official documents⁵ and statements in business documents.⁶ None of these exceptions, however, admits statements by persons who by the time of the trial are disabled by physical infirmity from giving evidence, or are abroad, or cannot be found, or who go into the witness box at the trial but refuse to give evidence. Evidence from another witness of what a person in any of these categories said on a previous occasion is inadmissible, however relevant it may be to an issue at the trial, and notwithstanding that there are insurmountable difficulties in the way of obtaining the person's evidence in court.

¹ Cross, p 509. A shorter formulation (omitting "or opinion") on p 38 of the 6th edn (p 42 of the 7th edn) was approved by the House of Lords in *R v Sharp* [1988] 1 WLR 7 at p 11, [1988] 1 All ER 65 at p 68, by the High Court of Justiciary in *Morrison v HMA* 1990 JC 299 at p 312, 1990 SCCR 235 at p 247, 1991 SLT 57 at p 62.

² It will be convenient to use the familiar term "statement" rather than "assertion". The definition of "statement" is discussed in paras 5.4-5.13 below.

³ Including audiotapes and videotapes.

⁴ A B Wilkinson, "Hearsay: a Scottish perspective" in *Justice and Crime* ed R F Hunter (1993), pp 71-79.

⁵ W G Dickson, *The Law of Evidence in Scotland* (3rd edn, 1887, ed P J Hamilton Grierson, hereafter "Dickson"), paras 1104, 1205 ff.

⁶ 10 *Stair Memorial Encyclopaedia* paras 574-598; Prisoners and Criminal Proceedings (Scotland) Act 1993, s 29 and Sched 3.

Reasons for the rule and the exceptions

3.4 The present law therefore does not seem to be in accordance with the principles that the law should be as clear and simple as possible and that all relevant evidence should be generally admissible. It is therefore necessary to see whether hearsay which is inadmissible under the present law is justifiably excluded for strong reasons.⁷ The rule against hearsay has been authoritatively explained in these terms:

"The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost."⁸

"The danger against which this fundamental rule provides a safeguard is that untested hearsay evidence will be treated as having a probative force which it does not deserve."⁹

In the following paragraphs we consider these justifications, among others, for the rule.

The best evidence

3.5 It is often said that the hearsay rule and its exceptions are justified because the rule excludes evidence which is not the best available evidence while the exceptions admit the best available evidence. Hearsay evidence is said to be inadmissible because "it is not the best evidence",¹⁰ but "is admitted where it is the best evidence obtainable".¹¹ Such statements appear to be made on the assumption that the hearsay rule is an example of a supposed "best evidence rule" to the effect that "there is but one general rule of evidence, the best that the nature of the case will admit."¹² The best evidence rule is said to be now applied so rarely as to be virtually extinct.¹³ In any event, however, the statements to which we have referred do not appear to be well-founded. Hearsay may be regarded as "not the best evidence" of the contents of the statement where the maker of the statement is available to give evidence himself: in such a situation his evidence, given by him personally in the witness box, may well be "the best evidence" if he continues to have an accurate recollection of the matter and is able to convey it to the court.¹⁴ Where, however, the maker of the statement is not available - where, for example, he is now dead or very ill, or there is some other good reason why he cannot give evidence in person - a written record of his statement, or a witness's oral account of his statement, may be the best available evidence of the matter in question. Nevertheless such evidence is generally excluded by the hearsay rule.

3.6 Nor have the various exceptions to the rule been evolved for the reason that they admit the best available evidence:

⁷ See para 2.30 above.

⁸ *Teper v R* [1952] AC 480 per Lord Normand at p 486, cited in *R v Blastland* [1986] AC 41 per Lord Bridge of Harwich at p 54.

⁹ *Blastland*, above, at p 54.

¹⁰ Dickson, para 245.

¹¹ J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (5th ed, 1948), p 317.

¹² *Onychund v Barker* (1745) 1 Atk 21 per Lord Hardwicke LC at p 49.

¹³ A Keane, *The Modern Law of Evidence* (3rd edn, 1994), p 19; A B Wilkinson, *The Scottish Law of Evidence* (1986), p 10; 10 *Stair Memorial Encyclopaedia* para 778.

¹⁴ See para 3.7 below.

"The whole development of the exceptions to the hearsay rule is based on the determination of certain classes of evidence as admissible or inadmissible 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."¹⁵

The High Court has recently indicated that the exceptions to the hearsay rule might be judicially extended, within the limits of established principles, to cases where it was impossible to obtain first-hand evidence and hearsay was the best evidence available.¹⁶ That seems an entirely appropriate policy for the future judicial development of the law in this area.

Evidence on oath or affirmation

3.7 Another ground for excluding hearsay is that the statement may not have been made on oath or affirmation. This ground is inconsistent with the rule that even where the statement has been made on oath or affirmation, for example in earlier proceedings, it is nevertheless generally inadmissible in later proceedings as evidence of the matters stated. The view is sometimes expressed that it is doubtful whether there is now anything substantial to be gained by requiring a form of oath or affirmation in any legal proceedings.¹⁷ We are prepared to assume, however, that the administration of the oath or affirmation by the presiding judge and the sanction of perjury are likely to draw to the witness's attention the solemnity of the occasion and the importance of the information he or she is about to be asked to give. Nevertheless it does not follow that the witness's evidence will be reliable. The lapse of time between the event to which the witness is to speak and the day in court may tax the witness's memory. In addition, he or she may be so stressed or flustered by being required to go to court and answer questions in the unfamiliar, formal surroundings of the courtroom that the evidence he or she gives may be incorrect or incomplete.

"If there are two scientific facts about the psychology of human memory which are clear beyond any doubt, one is that memory for an event fades gradually with time, and the other is that stress beyond a certain level can impair the power of recall."¹⁸

If a witness's memory is affected by either or both of these factors, a statement he or she made shortly after the event may well be more reliable than his or her evidence in court months or years afterwards. We adhere to the view expressed in our *Report on Corroboration, Hearsay and Related Matters in Civil Proceedings*:¹⁹

"While it is impossible to generalise on this, we think that in some cases a statement made in court and in the context of a litigation may in fact be more likely to be

¹⁵ *Myers v DPP* [1965] AC 1001 per Lord Reid at p 1024. See also W J Lewis, *Manual of the Law of Evidence in Scotland* (1925, hereafter "Lewis"), p 134: "That hearsay evidence is the best procurable in the existing circumstances of a case ... does not permit the use of this secondary evidence."

¹⁶ *Lord Advocate's Reference (No 1 of 1992)* 1992 JC 179, 1992 SLT 1010, 1992 SCCR 724 per L J-G Hope at pp 192-193, 1018, 743-744, Lord Allanbridge at pp 194, 1019, 745.

¹⁷ Glanville Williams, *The Proof of Guilt* (3rd ed, 1963), p 70.

¹⁸ J R Spencer and R Flin, *The Evidence of Children: The Law and the Psychology* (2nd edn, 1993, hereafter "Spencer and Flin"), p 268.

¹⁹ (1986) Scot Law Com No 100, para 3.16.

untruthful, or may at least be less reliable, than a statement made outwith that context."

Observation of demeanour

3.8 It is widely believed that judges and juries are able to assess the credibility and reliability of a witness by observing his or her demeanour in the witness box. Such observation is obviously impossible where the maker of a hearsay statement does not give evidence in court. We consider, however, that seeing the witness is an advantage which can be exaggerated. Lord Devlin, speaking of the English trial, wrote:

"The great virtue of the English trial is usually said to be the opportunity it gives to the judge to tell from the demeanour of the witness whether or not he is telling the truth. I think that this is overrated. It is the tableau that constitutes the big advantage, the text with illustrations, rather than the demeanour of a particular witness. On that I would adopt in their entirety (this being the highest form of judicial concurrence) the words of Mr Justice MacKenna:

I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.

"This is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I add to them such other facts as seem very likely to be true, as, for example, those recorded in contemporary documents or spoken to by independent witnesses like the policeman giving evidence in a running down case about the marks on the road. I judge a witness to be unreliable if his evidence is, in any serious respect, inconsistent with these undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour. When I have done my best to separate the true from the false by these more or less objective tests, I say which story seems to me the more probable, the Plaintiff's or the Defendant's."²⁰

3.9 Modern psychological research supports these views:

"At the risk of over-simplification, the conclusions of a large body of psychological research may be summed up as follows. In tests designed to discover how good people are at telling whether another person is lying, subjects rarely manage a success rate that is much above chance level, or what they would achieve by shutting their eyes and ears and making a guess. This is because the signs that are frequently associated with lying - like hesitancy, blushing, and a reluctance to look the questioner in the eye - are signs, not of lying, but of stress. And if a witness is under

²⁰ Lord Devlin, *The Judge* (1979), p 63. The quotation is from Sir Brian MacKenna, "Discretion" (1975) 9 *Irish Jurist* 1 at p 10.

stress, this may be either because he is lying, and finding it embarrassing and awkward to do so, or because he is finding it embarrassing and awkward to tell the truth. Sometimes surrounding circumstances may make it obvious that the embarrassment of the witness must stem from one source rather than from the other, but often - as with a child who has to give evidence about suffering an indecent assault allegedly committed by a relative, for example - the stress could as easily come from one source as the other. The most that can be said for the value of the demeanour of a witness as an indicator of the truth is that it is one factor, which must be weighed up together with everything else. It would be quite wrong to promote it to the level where we use it to accept or reject the oral testimony of a witness in the face of other weighty matters all of which point the other way."²¹

Ability of the jury to evaluate hearsay

3.10 In *R v Blastland* Lord Bridge said, before and after quoting the words of Lord Normand in *Teper v R* which we have set out above:²²

"Hearsay evidence is not excluded because it has no logically probative value. Given that the subject matter of the hearsay is relevant to some issue in the trial, it may clearly be potentially probative. The rationale of excluding it 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 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. ... The danger against which this fundamental rule provides a safeguard is that untested hearsay evidence will be treated as having a probative force which it does not deserve."²³

3.11 It is doubtful whether the hearsay rule in Scotland is rooted in the system of trial by jury. The rule applies both in jury trials and in summary trials. Sheriff Wilkinson has pointed out that neither distrust of the jury nor the requirements of sworn testimony and availability for cross-examination in adversary procedure are likely to have played a determinant part in the development of the rule against hearsay in Scottish practice, and that the dominant influence seems to have been the traditional civilian distrust of oral testimony.²⁴ The argument that juries would be unable to evaluate hearsay properly must nevertheless be considered. In our view it has little force. As we pointed out in our *Report on Corroboration, Hearsay and Related Matters in Civil Proceedings*, under the present law juries are required to weigh hearsay evidence which falls within exceptions to the general rule, and to understand and comply with directions which may be complex:

"... juries presently not only have to evaluate hearsay evidence in some cases but may also be required to distinguish between hearsay admitted as evidence of the facts stated and hearsay which is admitted for a more limited purpose and therefore use the same piece of evidence for one purpose while ignoring it for others. A jury might, for example, have to consider the probative value of an extra-judicial admission by one defender which is nevertheless inadmissible as regards a co-defender. This in our view is a more inappropriate task to impose on juries than the task of assessing the weight to be attached to hearsay. If it is accepted that the jury is capable of performing the former, it is difficult to see why they should be thought incapable of

²¹ Spencer and Flin, pp 280-281 (references omitted).

²² See para 3.4 above.

²³ [1986] AC 41 at pp 53-54.

²⁴ A B Wilkinson, "Hearsay: a Scottish perspective" in *Justice and Crime* ed R F Hunter (1993), pp 66-71.

assessing the value of hearsay in general, particularly as it is something which is so often encountered in everyday life outwith the confines of the courts."²⁵

We consider that any significant divergence between the kind of information on which members of a jury are allowed to reach their verdict and the kind of information they would rely on in reaching serious decisions in their own lives would tend to bring the criminal justice system into disrepute unless it could be shown that there was some strong reason for the divergence.

3.12 When hearsay evidence is admitted under an exception to the rule, the judge is required to direct the jury that hearsay evidence is different from direct evidence and that, when assessing hearsay, they must remember that it is different from evidence of oath which has been subject to cross-examination.²⁶ Such a direction appears to us to be simple and easy for a jury to understand. As the Criminal Law Revision Committee observed:

"Anybody with common sense will understand that evidence which cannot be tested by cross-examination may well be less reliable than evidence which can."²⁷

Absence of cross-examination

3.13 We consider that the strongest objection which can be made to the admission of hearsay is that there is no opportunity to cross-examine the maker of the statement. He cannot be questioned in order to ascertain whether he made the statement, and if he did, what he meant and how clearly he observed and understood the event which is the subject of the statement. As we said in our *Report on Corroboration, Hearsay and Related Matters in Civil Proceedings*:

"... in our view the fact that a person whose statement is reported to the court by another witness is not subject to cross-examination is much the most important reason for not simply abolishing the rule against hearsay. No doubt cross-examination may sometimes be unduly prolonged but in our view under our system of adversary procedure it can often be an essential tool for extracting the truth. Sometimes, though perhaps not very frequently, it enables one party to demonstrate that his opponent's witness is dishonest. More often, it enables the real import and weight of evidence, which is not actually dishonest, to be ascertained by an exploration of the sources, basis and context of the evidence in chief. Even more important, in our view it enables the witness to be asked questions about matters which may be relevant to the case but on which he has not been examined in chief."²⁸

3.14 We adhere to the view that the opportunity for cross-examination is often valuable. The objects of cross-examination are to test the reliability of the witness's evidence and to ascertain his evidence on matters other than those contained in the statement. These two objectives of cross-examination, however, are sometimes in conflict. If the reliability of a witness is attacked in a hostile cross-examination, the witness is likely to be put in a state of stress which hinders him from giving accurate additional evidence. Again, the use of leading questions in cross-examination is liable to distort the effect of the witness's evidence. As a means of eliciting useful additional evidence, cross-examination is likely to be effective only where the witness's recollection is accurate and he or she is sufficiently self-possessed

²⁵ (1986) Scot Law Com No 100, para 3.18.

²⁶ *Higgins v HMA* 1993 SCCR 542 at p 552.

²⁷ CLRC, para 247.

²⁸ (1986) Scot Law Com No 100, para 3.21.

to insist on giving complete answers. As a means of testing the reliability of evidence, cross-examination does not stand alone. The evidence may be tested against the admitted facts, or against contemporaneous documents or the evidence of other witnesses.

3.15 While we regard the opportunity for cross-examination as valuable, we do not consider it to be of such importance that any statement in respect of which no cross-examination is possible must be excluded as worthless. It might be possible to replace it with a comparable procedure if further exceptions to the hearsay rule were to be permitted. It would be important, in the interests of fairness, to take account of the absence of the opportunity for cross-examination by allowing the party against whom the hearsay statement was tendered to attack, as far as possible, the credibility and reliability of the maker of the statement on the same grounds as would have been available if he had been called as a witness. Provision is made for such an attack where a statement in a business document is adduced under paragraph 2 of Schedule 3 to the Prisoners and Criminal Proceedings (Scotland) Act 1993.²⁹ We discuss later whether similar provision should be made where a party tenders a statement by a person whose evidence is not available to the court.³⁰

Distortion through repetition

3.16 In addition to the arguments supporting the hearsay rule which were adduced in *Teper* and *Blastland*,³¹ we consider three further possible dangers in any further relaxation of the rule: distortion through repetition; superfluity; and concoction. There is an obvious danger of distortion of oral statements (though not of statements in documents) through repeated repetition, that is, where A tells the court what B told him C said. This danger could be avoided by requiring any new exception to the rule to be first-hand hearsay, that is, by requiring the evidence of the statement to be given by a witness who actually heard the maker uttering the statement. In such a case the danger would be one of mis-reporting by the witness, through some failure in hearing, understanding, recollection or narration in court. The witness, however, could be cross-examined to test whether he was credible and reliable, and as to the circumstances in which he heard the statement. The danger of inaccuracy is tolerated at present in cases where first-hand hearsay is admissible or where evidence of the making of a statement is led in order to establish the fact that the statement was made.³² An alternative requirement might be that the oral statement should have been recorded in a document.³³

Superfluity

3.17 It may be suggested that the effect of relaxing the hearsay rule would be to swamp the courts with superfluous hearsay, and thus to lengthen trials. We consider that any such risk could be avoided by clearly defining any new exceptions to the rule and by requiring the conditions of admissibility to be established to the satisfaction of the court. It could be further provided that, wherever possible, the admissibility of the statement should be determined at a diet prior to the trial diet.³⁴ If securing the admission of a statement in any

²⁹ 1993 Act, Sched 3, para 2(3).

³⁰ See paras 6.12-6.20 below.

³¹ See paras 3.4, 3.10 above.

³² Eg *Fisher v Keane* 1981 JC 50, 1981 SLT (Notes) 28; *McLeod v Lowe* 1991 JC 187, 1993 SLT 471.

³³ See paras 5.16-5.20 below.

³⁴ See paras 6.3-6.11 below.

new category of admissible hearsay was to be in practice a troublesome matter requiring careful preparation, as we think it should be, rather than a simple matter of complying with unexacting tests, any risk of superfluity should be minimal.

Concoction

3.18 It may also be suggested that any further relaxation of the hearsay rule might lead to the admission of fabricated evidence: witnesses might be prepared to give false evidence of statements which fell within any newly admissible category of hearsay. Here again we consider that the nature of the exceptions and of any pre-trial test of admissibility would minimise the danger of concoction. Where a pre-trial procedure was used, it would give the party against whom the statement was to be adduced some opportunity to check or challenge the veracity of the statement and the conditions of admissibility. It could also be provided that the statement would not be admissible if the party tendering it was responsible for the fact that the maker of the statement was not available to give evidence in person.³⁵ In any event, at the trial the risk of fabrication could be made obvious to the jury as a matter of common sense, the witness speaking to the making of the statement would be liable to cross-examination as to his or her credibility and reliability and, as we have proposed above, evidence could be led as to the credibility and reliability of the maker of the statement. With such safeguards, we see no reason why the normal rule that the risk of manufacture goes only to weight, not admissibility, should not apply.

Prior statements

3.19 None of those reasons for the hearsay rule applies to evidence of a prior statement made by a witness before he appears in the witness box. Although the prior statement will not usually have been made on oath or affirmation, the witness who made the statement is before the court on oath or affirmation, his demeanour can be observed, he can repeat the statement (if he remembers it) and he can be cross-examined as to what he said, why he said it and what he meant by it. Evidence of a witness's prior statement is nevertheless generally inadmissible as evidence of the truth of what the witness then said, as we explain in Part VII. The reasons for the rule appear to be that evidence of prior statements is unnecessary, since the witness is in court to speak to the facts and evidence of the statement will ordinarily have no value in the assessment of his or her credibility; and that false prior statements might be fabricated to demonstrate the witness's consistency. It will be convenient to examine these reasons when we consider the law as to prior statements in Part VII.

Disadvantages of the hearsay rule

3.20 Most of the disadvantages of the hearsay rule have been mentioned in the foregoing paragraphs. The rule appears to us to have two principal disadvantages. First, it may result in injustice by depriving the court of information which would be of value in ascertaining the truth. Where a statement containing information relevant to an issue before the court has been made by a person who is not available to give evidence, and the statement does not fall within one of the exceptions to the rule, the statement must generally be excluded from the court's knowledge, however reliable the information may be. Thus the rule offends against the general principle that all relevant evidence should be admissible. Secondly, the

³⁵ See paras 5.63-5.64 below.

technicality of the rule offends against the general principle that the law should be as clear and simple as possible.

3.21 We note that the evidence which is excluded by the rule not only is relevant, but also may well be reliable. It seems to us to be impossible to assert as a general proposition that hearsay evidence is necessarily less reliable than direct evidence. Oral evidence about an event which is given in court months or years afterwards by a witness of low intelligence with a poor memory may be much less reliable than a written record of the event made at the time by another eye-witness who was intelligent and disinterested but cannot now be brought to give evidence in court because he is seriously ill or cannot be found. The written record would be admissible if it qualified as a business document under paragraph 2 of Schedule 3 to the Prisoners and Criminal Proceedings (Scotland) Act 1993. Otherwise, however, it would be inadmissible. Evidence of an oral statement by the same intelligent eye-witness to another person of similar quality would also be inadmissible, although a court might well assess it as being of at least some probative value. It seems to us to be clear that hearsay evidence which is inadmissible under the present law might sometimes be wholly reliable, or might be the best available evidence about a matter in issue in a criminal trial.

Part IV Policies for the reform of the hearsay rule

The need for reform

4.1 In Part III we considered the reasons for, and the disadvantages of, the hearsay rule. We consider that the reasons for the rule are insufficient and its disadvantages are not acceptable. It appears to us that it is no longer justifiable to exclude hearsay statements simply because they could not be presented as first-hand information by a witness giving testimony on the basis of his own knowledge, but would be repeated to the court orally or would be placed before the court in the form of a record in a document. It does not seem to us to be possible to maintain that any benefits of excluding hearsay as a category of evidence outweigh the advantages of admitting a particular item of evidence which may have substantial probative value. While first-hand information given by an eye-witness in person in the witness box will often be the best conceivable evidence, the best should not be the enemy of the good. If the best conceivable evidence is unobtainable, that should not be a reason for excluding the best available evidence. In any rational search for relevant information, information which may be reliable is to be preferred to no information at all. Even evidence which may be unreliable should be considered, for absence of information is worse than potentially unreliable information.¹ The fact that a statement is hearsay should not in itself be a reason for excluding it from the knowledge of the court, but should be a matter for consideration by the jury when assessing the weight of the statement under judicial guidance.

Policies for reform

4.2 While the considerations mentioned in the last paragraph point towards some reform of the hearsay rule, it is not easy to determine the extent to which reform is desirable. Before we examine the various options for reform, we shall consider the requirements of the European Convention on Human Rights. Certain of the Convention's provisions seem to indicate that reform of the hearsay rule is not only desirable but necessary.

The European Convention on Human Rights

4.3 Since the European Convention on Human Rights² is not part of the law of Scotland³ or England,⁴ a citizen of the United Kingdom cannot obtain from a Scottish or English court a remedy for an alleged infringement by the State of his or her rights under the Convention, unless the right is also recognised by the law of Scotland or England. The United Kingdom, however, recognises both the rights of individual petition to the European Commission of

¹ W Twining, *Theories of Evidence: Bentham and Wigmore* (1985), p 39, citing Jeremy Bentham, *Rationale of Judicial Evidence* (1827) vol v, pp 1-33, *A Treatise on Judicial Evidence* (1825), p 229.

² Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). See 12 *Stair Memorial Encyclopaedia* sv "Human Rights in Europe"; D Feldman, *Civil Liberties and Human Rights in England and Wales* (1993), pp 47-50, 67-69.

³ *Kaur v LA* 1980 SC 319, 1981 SLT 322; *Moore v Secretary of State for Scotland* 1985 SLT 38; *Hamilton v Secretary of State for Scotland* 1991 GWD 10-624; 12 *Stair Memorial Encyclopaedia* para 8.

⁴ *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696.

Human Rights and the jurisdiction of the European Court of Human Rights. Thus, an accused person who claims that he has been the victim of a violation by the United Kingdom of the rights set forth in the Convention may petition the Commission, who may bring the case before the Court.⁵ It therefore appears to us to be desirable that wherever possible any reform of the law of Scotland which we recommend should accord with the Convention as expounded in the decisions of the European Court of Human Rights.⁶ In any event we consider the Convention to be of significance as a source of principles of public policy which we should take into account when framing recommendations for the reform of the law.⁷

4.4 The article of the Convention which is relevant to the reform of the hearsay rule in criminal cases is article 6, which provides:

"(1) In the determination ... 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 ...

"(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; ..."⁸

The rule stated in article 6(1), that everyone is entitled to a fair trial, is already a fundamental principle of Scottish criminal justice.⁹ The principle of fairness is an important consideration in determining whether evidence against the accused which has been obtained by illegal or irregular means should be admitted;¹⁰ and the admissibility of self-incriminating statements made to the police by suspects or accused persons also depends on general considerations of fairness.¹¹ The second limb of paragraph (3)(d), which is concerned with equality between prosecution and defence as regards obtaining the attendance and examination of witnesses, is likewise consistent with Scottish law and practice. The provision of article 6 which is unfamiliar and requires to be carefully considered is the first limb of paragraph (3)(d), which confers on the accused the right "to examine or have examined witnesses against him". This right of the accused has a bearing on the scope of any reform of the hearsay rule as to the admissibility of statements made before the trial by persons who by the time of the trial are dead or for any reason are unavailable as witnesses and accordingly cannot be cross-examined by the defence.

4.5 We have examined several recent cases in which the European Court of Human Rights has considered alleged violations of paragraph (1) and the first limb of

⁵ *eg Granger v UK* (1990) 12 EHRR 469, where a refusal to grant legal aid for an appeal to the High Court of Justiciary was held to be a violation of art 6(3)(c) taken together with art 6(1). See also *Boner v UK*, *Maxwell v UK*, *The Times*, 1 November 1994. The Commission and the Court will be merged on the entry into force of the Eleventh Protocol to the Convention: see H G Schermers, "The Eleventh Protocol to the European Convention on Human Rights" (1994) 19 *European Law Review* 367.

⁶ The Law Commission has expressed similar views: see *Binding Over* (1994) Law Com No 222, para 5.1. See also *Champion v Chief Constable of Gwent* [1990] 1 WLR 1, [1990] 1 All ER 116 *per* Lord Ackner at pp 14, 125; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.

⁷ J L Murdoch, "The European Convention on Human Rights in Scots Law" [1991] Public Law 40.

⁸ The same rights are conferred by the UN International Covenant on Civil and Political Rights (1966), art 14(1), (3)(c) and (e).

⁹ See paras 2.8, 2.9, 2.15, 2.16 above.

¹⁰ *Lawrie v Muir* 1950 JC 19, 1950 SLT 37 *per* L J-G Cooper at pp 27, 40.

¹¹ *Lord Advocate's Reference (No 1 of 1983)* 1984 JC 52, 1984 SLT 337, 1984 SCCR 62, *per* L J-G Emslie at pp 58, 340, 69.

paragraph (3)(d) of article 6. It is difficult to ascertain with confidence the Court's current view of the admissibility of hearsay evidence.¹² It appears to be well established that it is the Court's view that the admissibility of evidence is primarily a matter for regulation by national law, and as a general rule it is for the national courts to assess the evidence before them. Further, the guarantees in paragraph (3) are specific aspects of the right to a fair trial set forth in paragraph (1), and the Court, considering complaints of violation from the angle of paragraphs (3)(d) and (1) taken together, decides whether the proceedings considered as a whole, including the way in which evidence was taken, were fair.¹³ While that seems to be clear, the attitude of the Court to hearsay evidence appears to have altered in recent years. It has been said that a person is regarded as a "witness" for the purposes of article 6(3)(d) if a statement by him is before the trial court and is taken into account by it; and that as a rule, the rights of the defence require that an accused should be given an adequate and proper opportunity to challenge and question such a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.¹⁴ More recent cases, however, cast doubt on the force of that general rule.

4.6 The first of a line of recent cases which appears to confirm the rule and disapprove of the leading of hearsay evidence by the prosecution is *Unterpertinger v Austria*.¹⁵ In *Unterpertinger* the accused had been convicted mainly on the basis of statements made to the police by two non-compellable witnesses who had exercised their privilege to refuse to give oral testimony at the trial. The Court did not disapprove of the privilege or of the witnesses' exercise of it, but held that a violation had been established on the ground that the accused had been prevented from examining the witnesses or having them examined on their statements.¹⁶

4.7 In *Kostovski v Netherlands*¹⁷ and *Windisch v Austria*¹⁸ the public prosecutors had been trying to foster a policy of allowing witnesses to give evidence anonymously, in order to encourage them to denounce suspects. In *Kostovski* the accused's conviction had been based on reports of statements by two anonymous witnesses heard, in the absence of the accused and his counsel, by the police and, in one case, by the examining magistrate but not by the trial courts.¹⁹ In *Windisch*, similarly, the accused's conviction was based to a large extent on statements by two anonymous witnesses who had been heard, in the absence of the accused and his counsel, only by the police but not by the trial court.²⁰ The Court observed that the defence had been confronted with an almost insurmountable handicap: it had been deprived of the necessary information permitting it to test the witnesses' reliability or cast doubt on their credibility.²¹ The trial court had been prevented from observing their demeanour under questioning and thus forming its own impression of their reliability.²²

¹² For a detailed analysis of the cases see 12 *Stair Memorial Encyclopaedia* paras 57-59; S Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (1993), pp 230-236; C Osborne, "Hearsay and the European Court of Human Rights" [1993] Crim L R 255.

¹³ *Kostovski v Netherlands* (1990) 12 EHRR 434, para 39; (1989) Series A No 166.

¹⁴ *Ibid*, paras 40-41.

¹⁵ (1991) 13 EHRR 175; (1986) Series A No 110.

¹⁶ *Ibid*, paras 31-33.

¹⁷ See para 4.5 above.

¹⁸ (1991) 13 EHRR 281; (1989) Series A No 186.

¹⁹ *Kostovski*, *supra*, paras 42-45.

²⁰ *Windisch*, *supra*, paras 27-32.

²¹ *Ibid*, para 28.

²² *Ibid*, para 29.

4.8 In *Delta v France*²³ the Court held that the accused had not received a fair trial because his conviction had been based to a decisive degree on statements by the complainant and a friend, who had been interviewed by the police but had not been examined by the accused or his counsel or by the courts trying the facts, so that they were unable to test the witnesses' reliability or cast doubt on their credibility.²⁴ A similar approach was taken in *Lüdi v Switzerland*,²⁵ where the evidence against the accused included statements by an anonymous undercover police officer whom the defence had no opportunity to question and on whose credibility they could not cast doubt. Again, the Court held a violation to be established in *Saïdi v France*,²⁶ where the sole basis for conviction was identification evidence in the statements of witnesses whom the defence had had no opportunity to question.

4.9 The decisions of the Court in these cases suggest that a conviction in a Scottish court which was based on hearsay evidence admitted under an exception to the hearsay rule might be held to have been obtained in violation of article 6(1) and (3)(d). In other cases, however, the Court's approach to the admissibility of hearsay evidence for the prosecution appears to have been somewhat different.

4.10 In *Isgrò v Italy*²⁷ the Court held that there had been no violation of these provisions where the trial court had relied on statements made by a witness at a confrontation between the accused and the witness when the accused's lawyer was not present. At the date of the trial the witness could not be found. The Court took account of the fact that the conviction had not been based solely on the witness's statements.

4.11 In *Asch v Austria*²⁸ the complainant, like the witnesses in *Unterpertinger*,²⁹ was not compellable and refused to testify at the trial. The trial court took account of her pre-trial statements. In a majority judgment the European Court took account of the fact that these statements were not the only evidence on which the conviction was based and found that there had been no violation of article 6(1) and (3)(d). In a strong dissenting judgment two judges, including the United Kingdom judge Sir Vincent Evans, expressed the view that the case was comparable to *Unterpertinger*.

4.12 In *Artner v Austria*³⁰ the complainant made statements to the police and the investigating judge when the accused was not present. The accused disappeared before the trial, making any confrontation between him and the complainant impossible. The complainant was summoned to the trial as a prosecution witness, but she failed to attend and could not be found. The trial court convicted the accused on the basis of the complainant's statements and other documentary evidence. The European Court held, by a bare majority of 5 votes to 4, that there had been no violation of article 6(1) and (3)(d), taking into account the accused's own pre-trial absence and the fact that the complainant's statements had not been the only evidence supporting the conviction. Three of the dissenting judges observed that the accused, through no fault of his own, had been deprived of his right to examine the complainant as to her "obviously damaging" statement, the admission of which had been

²³ (1993) 16 EHRR 574; (1990) Series A No 191.

²⁴ *Ibid*, para 37.

²⁵ (1993) 15 EHRR 173; (1992) Series A No 238.

²⁶ (1994) 17 EHRR 251; (1993) Series A No 261-C.

²⁷ (1991) Series A No 194-A.

²⁸ (1993) 15 EHRR 597; (1991) Series A No 203.

²⁹ See para 4.6 above.

³⁰ (1992) Series A No 242-A.

"very prejudicial" to the accused and without which the conviction could not have been obtained. The fourth dissenting judge considered the case to be indistinguishable from *Unterpertinger*.

4.13 In the cases of *Isgrò*, *Asch* and *Artner* the European Court seems to have been prepared to depart from the literal interpretation of article 6(3)(d) and to emphasise the extent to which it must be read in conjunction with article 6(1) which establishes the accused's right to a fair trial. In these cases the consideration that the accused had no opportunity to examine a witness against him, and thus might be said to have been deprived of his right under the first limb of article 6(3)(d), literally interpreted, is outweighed by the considerations that it has not been possible to produce the witness for examination by the defence, and that there is other evidence which supports the conviction. It must be observed, however, that *Asch* and *Artner* were majority decisions and that *Unterpertinger*, *Kostovski*, *Windisch*, *Delta*, *Lüdi* and *Säidi* have not been overruled.

4.14 It is also important to notice that while the Convention, literally interpreted, appears to forbid the use of hearsay evidence against the accused by the prosecution, it does not in any way restrict the use of hearsay evidence by the defence. It appears that if an accused were not allowed to lead relevant evidence on the ground that it was inadmissible hearsay, he or she might well be able to establish before the European Court a violation of his or her right to a fair trial under article 6(1).

4.15 The defendant in *Blastland*³¹ made an application on that basis to the European Commission of Human Rights after the failure of his appeal to the House of Lords. At the trial the defence had made an unsuccessful application to lead evidence of statements by a third party confessing to the crimes with which the accused was charged and indicating special knowledge of their commission. The trial judge had ruled that the evidence was inadmissible as it was all hearsay. The judge had also refused a defence application that the third party be called, treated as a hostile witness and cross-examined by the defence about his statements. Before the Commission the accused complained of

"an unfair trial, in violation of article 6 para 1 of the Convention, in that the United Kingdom courts refused to admit vital evidence tending to implicate a third party of having committed the crimes in question, and hence pointing to the applicant's innocence."

4.16 The Commission declared the application inadmissible.³² As to the hearsay rule it found, echoing the speech of Lord Bridge in the House of Lords:

"The purpose of the rule in the jury trial system is partly to ensure that the best evidence is before the jury, who can evaluate the credibility and demeanour of the witness, and partly to avoid undue weight being given to evidence which cannot be tested by cross-examination. The Commission finds the purpose of the rule legitimate, and not, in principle, contrary to article 6 para 1 of the Convention."

The Commission concluded that "the principle of equality of arms", that is, the procedural equality of the accused with the prosecution, which is reflected in the second limb of article 6(3)(d),³³ had been respected. It noted

³¹ [1986] AC 41.

³² *Blastland v UK* (1988) 10 EHRR 528; No 12045/86, 7 May 1987.

"in particular the possibility for the defence to have called the third party in question. Although that person could not have been made to incriminate himself, the Commission considers that this possibility, together with that of calling other original evidence about him (which evidence, including medical expertise, was admitted), placed the prosecution and defence on an equal footing. The Commission also notes that the applicant was afforded full facilities to challenge the hearsay ruling of the domestic courts and the prosecution case against him, which included forensic evidence."

4.17 We doubt whether the first part of the Commission's reasoning in the above quotation is convincing. The possibility for the defence to have called the third party seems to have been only theoretical: they had been refused the right to treat him as a hostile witness, and he could and very probably would have claimed the privilege against self-incrimination. In these circumstances the right to call him as a defence witness appears to have been of virtually no practical importance. We also doubt whether the European Court would necessarily take the view that the purpose of the hearsay rule is legitimate and not in principle contrary to article 6(1). It is not impossible that the Court would hold that the denial of an opportunity to the defence to lead relevant evidence on the ground that it was inadmissible hearsay violated the accused's right to a fair trial.

4.18 Notwithstanding the change in approach which the cases of *Isgrò*, *Asch* and *Artner*³⁴ seem to indicate and the failure of *Blastland's* application, we consider that there remains a doubt as to how the European Court of Human Rights would regard a conviction in a Scottish court which either (1) was based to any extent on a statement or statements the maker or makers of which had not given evidence at the trial, where by the law of Scotland the statements were admissible as evidence of the truth of their contents by virtue of an exception to the hearsay rule; or (2) followed a ruling by the trial court that relevant evidence tendered by the defence was inadmissible hearsay. When considering convictions in the first category, it may not be wise to assume that the European Court would be influenced to uphold a conviction by the law and practice as to hearsay in other Contracting States where, it may be thought, convictions may be based on hearsay evidence. It is sometimes assumed that free evaluation of the evidence furnished by hearsay testimony is characteristic of continental European systems, and that the fact that it is hearsay is not a ground for excluding it but is a matter to be weighed when its effect is evaluated. The position is not so straightforward. In France:

"As things stand today, a French defendant can insist on the court hearing a witness whose presence it is possible to secure, unless he already had a chance to put his

questions to him earlier in the proceedings: usually at a *confrontation* arranged by the *juge d'instruction*.³⁵

In Germany hearsay is admissible only as an item of evidence which requires corroboration, and the accused may generally insist on direct evidence from the maker of the statement.³⁶ Indeed it is possible that the decisions of the Court in *Unterpertinger* and the subsequent cases to the same effect which have been noted above may bring about changes in law and practice in

³³ See para 4.4 above.

³⁴ See paras 4.10-4.13 above.

³⁵ J R Spencer, "Hearsay evidence in the civil law systems: France and Germany" (unpublished, 1994); see also J R Spencer, "Orality and the evidence of absent witnesses" [1994] Crim L R 628 at pp 640-642.

³⁶ *Ibid.*

certain of the Contracting States. It is said that as a result of a series of rulings from the court, the courts in France and the Netherlands "are now moving rather grudgingly towards requiring oral testimony from key witnesses whose evidence is contentious".³⁷

4.19 We also doubt whether it would be prudent to attach any significance to the fact that apparently no conviction in a court in the United Kingdom has ever been successfully challenged before the European Court on the ground that it was based on hearsay evidence admissible under the national law. It has been said that

"... it may be that there is a lack of awareness at the British Bar about the relevance of the Convention to criminal law. The Convention is well-known in legal circles for its impact on minority groups and traditional civil liberties, but it is not always appreciated that the vast bulk of the decisions under it are mainstream criminal procedure and evidence cases."³⁸

Options for reform

4.20 In theory, there is a variety of possible solutions to the problem of reforming the hearsay rule. One is to leave it to the courts to modify the rule as the need arises. That is said not to be possible in England, where the House of Lords has held by a majority that reform of the hearsay rule is a matter for Parliament, not the courts.³⁹ In Scotland, on the other hand, the High Court has recently indicated that the categories of exceptions to the hearsay rule are not closed but may be judicially extended, although only within the limits of established principles.⁴⁰ It seems clear, however, that any judicial reform would necessarily be gradual since it could be undertaken only when appropriate cases arose for decision.

4.21 A second possible solution would be to abolish the rule against hearsay and admit all hearsay without restriction, as in civil proceedings in Scotland.⁴¹ None of those who responded to the Discussion Paper⁴² favoured the abolition of the rule. We have already observed that there are compelling reasons why that should not be done.⁴³ In addition, a policy of admitting all hearsay against the defence would be likely to be condemned by the European Court of Human Rights.⁴⁴

4.22 A third possibility, which might be thought to be in accordance with the European Convention on Human Rights, would be to give the defence more liberal rights than the prosecution to adduce hearsay evidence. We consider this course below.⁴⁵

³⁷ J R Spencer, book review in [1994] Cambridge Law Journal 181-182.

³⁸ C A Gearty, "The European Court of Human Rights and the protection of civil liberties: an overview" [1993] Cambridge Law Journal 89 at p 105.

³⁹ *Myers v DPP* [1965] AC 1001 per Lord Reid at pp 1021-1022. In some cases the English courts appear to have circumvented this policy: see A Ashworth and R Pattenden, "Reliability, hearsay evidence and the English criminal trial" (1986) 102 LQR 292; D J Birch, "Hearsay-logic and hearsay-fiddles: *Blastland* revisited" in *Criminal Law: Essays in Honour of J C Smith* ed P Smith (1987) p 24.

⁴⁰ *Lord Advocate's Reference (No 1 of 1992)* 1992 JC 179, 1992 SLT 1010, 1992 SCCR 724 per L J-G Hope at pp 192-193, 1018, 743-744, Lord Allanbridge at pp 194, 1019, 745. See para 3.6 above.

⁴¹ Civil Evidence (Scotland) Act 1988, s 2.

⁴² DP, para 3.9, prop 2.

⁴³ See paras 2.8-2.12 above.

⁴⁴ See paras 4.3-4.19 above.

⁴⁵ See paras 4.27-4.32 below.

4.23 A fourth would be to admit or exclude hearsay, by whichever party it was adduced, at the discretion of the judge. We also consider this possibility in the following paragraphs.⁴⁶

4.24 A fifth would be to undertake a comprehensive restatement in legislation of the hearsay rule, the existing exceptions and any new exceptions, so that all the law as to hearsay in criminal proceedings in Scotland would be contained in a single statute. That course has been taken in the Federal Rules of Evidence and in the reports of a number of law reform agencies.⁴⁷ It is clear from these examples that a restatement of the rule would be a complex and elaborate task. In the Discussion Paper we stated that it was not our intention to restate all aspects of the hearsay rule in criminal proceedings. We expressed the view that the law regarding such matters as the admissibility of statements made against interest by accused persons, and the use and function of *res gestae* statements, should be left to the courts.⁴⁸ Those who responded to the Discussion Paper did not offer any criticism of these views.

4.25 A sixth option would be to clarify or improve at least some of the existing exceptions to the rule, add any further exceptions which appeared to be necessary and make the exceptions available to the prosecution and the defence equally, with procedural safeguards against surprise or abuse. This option is essentially the approach taken in the Discussion Paper, which was to concentrate on areas where there was doubt as to the present exceptions to the rule, or where there might be an argument for some new exceptions. Our consultees unanimously agreed that the existing exceptions to the rule should be examined to see whether they could be clarified, extended or improved.⁴⁹

4.26 The sixth option is the one which we shall propose later in this Report. We shall, however, examine the third and fourth options in the following paragraphs. Each of them has been proposed or adopted recently in other jurisdictions, and we think it is appropriate that we should explain why we do not recommend either of them for Scotland.

Wider admissibility of hearsay for the defence than for the prosecution

4.27 Under the present law the rule against hearsay applies equally to evidence tendered by the prosecution and evidence tendered by the defence. We have already noted that while the European Convention on Human Rights apparently forbids the use of hearsay evidence against the accused by the prosecution, it does not in any way restrict the use of hearsay evidence by the defence.⁵⁰ In support of a disparity of this kind it is sometimes maintained that it is necessary to give the defence more liberal rights than the Crown to adduce hearsay because a miscarriage of justice should not be risked by shutting out any evidence for the defence, even though it may be hearsay.⁵¹ Thus it has been proposed in England that the court should have power to receive hearsay evidence at the request of the accused and

⁴⁶ See paras 4.33-4.46 below.

⁴⁷ Eg CLRC; Law Reform Commission of Canada, *Report on Evidence* (1977); New South Wales Law Reform Commission, *Report on the Rule against Hearsay* (LRC 29, 1978); Law Reform Commission of Australia, *Evidence* (ALRC 38, 1986). The Law Commission of New Zealand has discussed a codified rationalisation of the hearsay rule in criminal proceedings in *Evidence Law: Hearsay* (Preliminary Paper No 15, 1991).

⁴⁸ DP, para 3.12.

⁴⁹ DP, paras 3.8, 3.9, prop 2.

⁵⁰ See para 4.14 above.

⁵¹ Glanville Williams, *Proof of Guilt* (3rd ed, 1963), pp 209-211.

should do so if it considers it reasonable in the interests of justice in the circumstances of the particular case.⁵²

4.28 In Australia, the Evidence Bill currently before the Parliament of the Commonwealth of Australia allows the prosecution to lead hearsay evidence in only a limited set of circumstances but generally entitles the accused to adduce evidence of a hearsay representation where the maker of the representation is not available, either by adducing oral evidence from a witness to the making of the representation or by tendering a document containing the representation.⁵³ These provisions are based on recommendations by the Australian Law Reform Commission which were founded on a concern to minimise the conviction of the innocent.⁵⁴ The Commission considered that, in general, the accused should be able to have first-hand hearsay evidence admitted when it was the best evidence he or she had available.⁵⁵ The Commission envisaged that the defence would be entitled to adduce an exonerating statement of the alleged victim or a confession by a third party, where the victim or third party was not available, and statements of deceased persons who could have given evidence.⁵⁶

4.29 A further argument for giving the defence wider rights than the prosecution to lead hearsay, which is not mentioned by those proposing the reforms mentioned above, is that while the prosecution has to prove its case beyond reasonable doubt, the accused generally does not have to prove any defence but only has to raise a doubt by pointing to evidence in support of the doubt; and evidence which may be quite insufficient to establish the prosecution case beyond reasonable doubt may be quite sufficient to raise a doubt.

4.30 In other jurisdictions courts of high authority have expressed differing views on the question whether a distinction may be drawn between the prosecution and the defence with regard to the leading of hearsay evidence. In *Sparks v R*⁵⁷ the Privy Council indicated that the hearsay rule must apply equally to both, while in *Turner*⁵⁸ Milmo J observed:

"The idea, which may be gaining prevalence in some quarters, that in a criminal trial the defence is entitled to adduce hearsay evidence to establish facts, which if proved would be relevant and would assist the defence, is wholly erroneous."

On the other hand, in *Lucier v R*⁵⁹ the Supreme Court of Canada drew a distinction between hearsay statements against penal interest by an unavailable third party which were exculpatory of the accused and were admissible, and those which were inculpatory of the accused and were inadmissible: the prosecution could not lead evidence of a third party's confession which implicated the accused in the crime, but the defence could lead evidence of a third party's confession which exonerated the accused.

4.31 In England the Criminal Law Revision Committee recognised that there was a case in principle for wider admissibility of evidence on behalf of the defence than on behalf of the prosecution, but the majority were "strongly of the opinion that the interests of justice

⁵² *Miscarriages of Justice*, a report by JUSTICE (1989), paras 3.31-3.44.

⁵³ Cl 65(8).

⁵⁴ *Evidence (Interim)* (ALRC Report No 26, 1985), vol 1, paras 679, 692.

⁵⁵ *Evidence* (ALRC Report No 38, 1987), para 128.

⁵⁶ *Evidence (Interim)*, above, para 692.

⁵⁷ [1964] AC 964 at p 978.

⁵⁸ (1975) 61 Cr App R 67 at p 88.

⁵⁹ (1982) 132 DLR (3d) 244.

require that the parties should in general be treated alike" in relation to hearsay evidence.⁶⁰ They did not favour a proposal that a hearsay statement by a very young child⁶¹ might be made, exceptionally, admissible on behalf of the defence but not on behalf of the prosecution:

"the committee generally are opposed to this on the ground that the principle must be maintained that any evidence admissible for the defence must be admissible for the prosecution also."⁶²

4.32 We doubt whether such a principle is a helpful guide to the reform of the hearsay rule. As we have already noted, the law of evidence draws several important distinctions between the prosecution and the defence.⁶³ Nevertheless we are not convinced that it is necessary or desirable to draw a further distinction in relation to the leading of hearsay evidence. One consideration is that curious results might follow. The prosecution might be entitled to cross-examine a defence witness on hearsay evidence he had given in chief which the prosecution, had they led him as a witness, would not have been entitled to elicit from him. In a trial where there were co-accused, one accused might be entitled to elicit from a defence witness hearsay evidence implicating a co-accused which the prosecution would not have been entitled to lead. A further consideration is that while it is important to take account of any risk of an erroneous conviction through the exclusion of relevant hearsay evidence for the defence, it is also necessary to maintain or improve, as far as possible, the effectiveness of the criminal justice system not only in acquitting the innocent but also in convicting the guilty. No doubt an ideal rule would both protect the innocent and assist the conviction of the guilty. In the real world, however, a rule designed to protect the innocent also protects those who are in fact guilty. That is true of the rule requiring proof of guilt beyond reasonable doubt, and we think it would also be true of a rule giving the defence wider rights than the Crown to lead hearsay evidence. It is likely that manufactured hearsay evidence would be led which might be sufficient, if not to convince a jury, at least to raise what they would regard as a reasonable doubt in their minds as to the guilt of the accused. As we shall explain later,⁶⁴ we consider that it may be possible to apply rules as to hearsay equally to the prosecution and the defence without contravening the European Convention of Human Rights.

Judicial discretion

4.33 It is sometimes suggested that the problems presented by the hearsay rule could be solved by enacting a provision whereby hearsay would be admissible at the discretion of the trial judge. Such a provision might take either or both of two basic forms: it might confer on the judge an inclusionary discretion to admit hearsay evidence which would be otherwise inadmissible; or an exclusionary discretion to exclude hearsay evidence which would be otherwise admissible; or both an inclusionary and an exclusionary discretion. In favour of a judicial discretion it may be argued that, without it, the rigidity of the law might sometimes result in injustice, either through the exclusion of highly relevant evidence or through the admission of evidence which was unduly prejudicial or unfair to the accused; and that it would be preferable to introduce a measure of elasticity by giving the judge, over and above

⁶⁰ CLRC, para 246, footnote 2.

⁶¹ As in *Sparks* (above).

⁶² CLRC, para 250.

⁶³ See para 2.15 above.

⁶⁴ See paras 4.49-4.50, 6.27-6.30 below.

his general duty to rule on the admissibility of evidence as a matter of law, a discretionary power to admit legally inadmissible hearsay and to exclude legally admissible hearsay.⁶⁵ We now consider separately the cases for an inclusionary and for an exclusionary discretion.

Inclusionary discretion to admit hearsay

4.34 It appears to be generally accepted that at common law a judge in a Scottish criminal trial has no discretionary power to admit legally inadmissible hearsay.⁶⁶ In Canada, however, the Supreme Court has recently introduced a discretion to admit otherwise inadmissible hearsay evidence where it satisfies the conditions of necessity and reliability. In *R v Smith*⁶⁷ the Court referred to its earlier decision in *Khan*⁶⁸ which, the Court said,

"signalled an end to the old categorical approach to the admission of hearsay evidence. Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity."

The Court now takes the view that

"... 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 were made satisfy the criteria of necessity and reliability ..., 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. Properly cautioned by the trial judge, juries are perfectly capable of determining what weight ought to be attached to such evidence, and of drawing reasonable inferences therefrom."⁶⁹

In Australia, Kirby P observed in *R v Astill*⁷⁰ that there was

"much to be said for the view that a trial judge should, in certain circumstances, have a general residual discretion to admit otherwise inadmissible hearsay evidence."

Kirby P referred to the dictum of Mason CJ in *Walton v The Queen*:⁷¹

"The hearsay rule should not be applied inflexibly. When the dangers which the rule seeks to prevent are not present or are negligible in the circumstances of a given case there is no basis for a strict application of the rule. Equally, where in the view of the trial judge those dangers are outweighed by other aspects of the case lending reliability and probative value to the impugned evidence, the judge should not then exclude the evidence by a rigid and technical application of the rule against hearsay."

Kirby P noted, however, that the view was not without its critics.⁷²

4.35 The reasoning of the Criminal Law Revision Committee in relation to a proposed statutory provision conferring an exclusionary discretion seems to us to be equally

⁶⁵ A Keane, *The Modern Law of Evidence* (3rd edn, 1994), p 32.

⁶⁶ cf *Myers v DPP* [1965] AC 1001 per Lord Reid at p 1024; see also *Sparks v R* [1964] AC 964 at p 978.

⁶⁷ (1992) 94 DLR (4th) 590 at pp 603-604.

⁶⁸ [1990] 2 SCR 531.

⁶⁹ *Ibid* at p 607.

⁷⁰ Court of Criminal Appeal, New South Wales, unreported, 25 August 1992.

⁷¹ High Court of Australia, (1989) 166 CLR 283 at p 293; (1988) 84 ALR 59 at p 66. See also *Pollitt v R* (1992) 108 ALR 1, Mason CJ at p 6.

⁷² *Pollitt*, above, Brennan J at p 13.

applicable to one conferring an inclusionary discretion. The Committee concluded that while such a provision would be of the simplest, it should not be adopted because it involved serious difficulties. Among them were the considerations that differences of opinion about the value of hearsay evidence would lead to large differences in practice between different courts; that it would be difficult for parties to prepare, because there would be no way of knowing in advance whether a court would admit a particular piece of hearsay evidence; and in summary trials the bench, who would have to give the ultimate verdict, would ordinarily have to hear the statement in order to decide whether to exercise the discretion to admit it.⁷³ For the same reasons we consider that a Scottish court should not be given an inclusionary discretion to admit hearsay evidence which would be otherwise admissible. We would add that if the exercise of a judicial discretion was not to cause injustice, it would have to be reviewable on appeal. Appeal courts, however, either might be properly reluctant to interfere with the decisions of trial judges or, as appears to have happened in England, might produce decisions which were difficult to reconcile with one another.⁷⁴

Exclusionary discretion to exclude hearsay

4.36 The question whether a Scottish court should have an exclusionary discretion to exclude hearsay which would otherwise be admissible was raised in the Discussion Paper.⁷⁵ Proposition 4 sought views on two alternative propositions: (a) that it should be expressly declared by statute that, where hearsay evidence would otherwise be admissible in criminal proceedings, there should be no judicial discretion to exclude it on any ground; and, alternatively, (b) that it should be expressly declared by statute that, where hearsay evidence would otherwise be admissible in criminal proceedings, the judge should nonetheless have a discretion to exclude that evidence if its terms, or the circumstances in which the statement was made, give rise to a reasonable suspicion either that the statement was not in accordance with the truth, or was a distorted, one-sided version of the truth.⁷⁶

4.37 As we have recorded in our *Report on Documentary Evidence and Proof of Undisputed Facts in Criminal Proceedings*,⁷⁷ our consultation disclosed clear differences of opinion on these matters. Indeed differing views were expressed as to whether the Scottish courts already have a general discretion to exclude evidence which would otherwise be admissible. It appears to us that the only situation in which a Scottish judge in a criminal trial clearly has a discretion to exclude such evidence arises where he is required to decide whether to grant or refuse leave to cross-examine the accused in terms of section 141(1) proviso (f) or section 346(1) proviso (f) of the Criminal Procedure (Scotland) Act 1975.⁷⁸ It has also been said that the judge has a discretion to excuse a witness upon a ground of conscience from answering a relevant question which the judge considers to be unnecessary or not useful.⁷⁹ However that may be, the question for discussion now is whether an exclusionary judicial discretion should be conferred or excluded by statute.

⁷³ CLRC, para 246.

⁷⁴ See J R Spencer, "Orality and the evidence of absent witnesses" [1994] Crim L R 628 at pp 634-635.

⁷⁵ DP, paras 3.28-3.44.

⁷⁶ DP, para 3.44.

⁷⁷ (1992) Scot Law Com No 137 (hereafter "*Report on Documentary Evidence*"), para 2.61.

⁷⁸ *Leggate v HMA* 1988 JC 127; 1988 SLT 665; 1988 SCCR 391. If a decision to admit evidence by excusing an illegality or irregularity whereby it has been obtained is to be regarded as the exercise of a discretion, it is an inclusionary discretion to admit evidence otherwise inadmissible which operates against the accused. The text above discusses the existence of a discretion to exclude evidence which is legally admissible, and operates in favour of the accused.

⁷⁹ *HMA v Airs* 1975 JC 64 at p 70, 1975 SLT 177 at p 180.

4.38 In our *Report on Documentary Evidence*⁸⁰ we expressed the view that there should not be any statutory provision conferring on the court a discretion to exclude evidence which would be admissible in terms of our recommendations. Thus our recommendations in that Report had no bearing on the question whether the court might exercise such a discretion at common law. We refrained from recommending a statutory exclusionary discretion not only because we believed that in general there was no such discretion at common law but also because we considered that the introduction of such a discretion would be likely to lead to inconsistent decisions by trial judges in similar circumstances, and the High Court sitting as a Court of Criminal Appeal might be properly reluctant to interfere with the exercise of a judge's discretion. It appeared to us that there would therefore be a serious risk of uncertainty in this branch of the law: it would be difficult to predict how the discretion would be exercised and thus to prepare for trial, and it would be difficult for defence lawyers to advise their clients. We considered that it would be undesirable to introduce any statutory provision which would lead to uncertainty in the administration of criminal justice. It is also important that evidence admitted against an accused should be seen to have been admitted in accordance with a rule of law, and not because the trial judge declined to exercise a discretion to exclude it.

4.39 Those who favour the introduction of a statutory discretion to control the admission of hearsay may nevertheless point to other jurisdictions where such a discretion exists or has been proposed by law reform bodies. Many models could be discussed. It may suffice to consider two notable examples: rule 803(24) of the Federal Rules of Evidence and Part II of the Criminal Justice Act 1988. In the United States of America rule 803 of the Federal Rules specifies the categories of statement which are not excluded by the hearsay rule. Twenty-three categories are stated in rules 803(1) to (23), and rule 803(24) adds "A statement not specifically covered by any of the foregoing exceptions" provided that the court makes five findings: (1) the statement must have "circumstantial guarantees of trustworthiness" which are "equivalent" to those in rules 803(1) to (23); (2) the statement "is offered as evidence of a material fact"; (3) it must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts"; (4) "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence"; and (5) the proponent must have given the adverse party sufficient notice of the statement to provide him with a fair opportunity to prepare to meet it.

4.40 Rule 803(24) is said to have opened the door "to the admission of needed, relevant, reliable evidence that does not conform to a class exception, and to the development of new class exceptions as experience warrants".⁸¹ On the other hand it has been observed that to be able to apply the residual discretion conferred by rule 803(24) it is necessary to have a clear understanding of "the general purposes of these rules and the interests of justice", matters on which the rules offer no guidance; and that the discretion has been applied differently in different circuits and districts of the US Federal Court, some being much more liberal than others.⁸²

⁸⁰ Para 2.62.

⁸¹ *Weinstein's Evidence*, vol 4 (1994), p 803-442. On the ability of the Scottish courts to develop new exceptions to the hearsay rule see para 4.20 above.

⁸² Law Reform Commission of Australia, *Evidence Reference: Research Paper No 9* (1982), pp 31-32; also *Research Paper No 3* (1981), pp 95-98, 111-112, 118-119.

4.41 In England and Wales Part II of the Criminal Justice Act 1988, which is concerned with documentary evidence in criminal proceedings, contains complex provisions as to the exercise of judicial discretion in relation to statements in documents. Statements in documents containing "first-hand hearsay" are admissible by virtue of section 23, and statements in "business etc documents" by section 24. Section 25, however, provides that the court may direct that such a statement shall not be admitted if, having regard to all the circumstances, the court is of the opinion that in the interests of justice the statement ought not to be admitted. Thus the court may exclude a statement tendered by the defence as well as a statement tendered by the prosecution.⁸³ Section 25 goes on to specify the factors which the court must consider in exercising its discretion to exclude a statement in the interests of justice.

4.42 Section 26 of the 1988 Act is concerned with statements in documents that appear to have been prepared for the purposes of criminal proceedings or investigations. These are not to be given in evidence without the leave of the court, and the court is not to give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice. Section 26 gives a list of factors the court must consider which is different from the list in section 25. A more important difference between the two sets of provisions is that while a statement to which section 23 or 24 applies is admissible unless the court is satisfied that in the interests of justice it ought not to be admitted, a statement to which section 26 applies is inadmissible unless the court is satisfied that it ought to be admitted.⁸⁴

4.43 Section 28(1)(b) of the 1988 Act provides that "any power of a court to exclude at its discretion" a statement admissible by virtue of Part II remains unaffected. Thus the court retains its discretion to exclude evidence at common law and under section 78 of the Police and Criminal Evidence Act 1984. At common law the court may exclude evidence on the ground that its prejudicial effect on the accused outweighs its probative value.⁸⁵ Under section 78 of the 1984 Act the court may exclude evidence on which the prosecution proposes to rely if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

4.44 These provisions have been criticised on the ground of complexity. It has also been observed that the admissibility of a statement to which they apply depends on the view of the individual judge who tries the case and, where the accused has appealed on the ground that the judge has exercised his discretion wrongly, on the views of the Court of Appeal.⁸⁶

4.45 Our examination of rule 803(24) of the Federal Rules of Evidence and Part II of the Criminal Justice Act 1988 appears to us to confirm our view that a statutory provision conferring a judicial discretion to control the admission of hearsay would be difficult to draft in simple terms and would be likely to lead to uncertainty in the administration of justice. These considerations, and the other disadvantages of a discretionary approach to which we

⁸³ *R v Buzalek and Schiffer* [1991] Crim L R 116.

⁸⁴ *R v Cole* [1990] 1 WLR 866.

⁸⁵ *R v Sang* [1980] AC 402.

⁸⁶ J R Spencer, "Orality and the evidence of absent witnesses" [1994] Crim L R 628 at pp 630, 632, 634-635; Spencer and Flin, p 136.

have already referred,⁸⁷ seem to us to outweigh the possible advantages that hearsay which was legally admissible but had probative value, or which was legally admissible but unfairly prejudicial to one side or the other, could be admitted or excluded in the exercise of a judicial discretion.

4.46 The policy of rejecting a discretionary approach also has the advantages that it is consistent with the way in which the law of evidence in Scotland has evolved and it does not require the Scottish judiciary and legal profession to become accustomed to the exercise of an important but unfamiliar new power. Further, in order to exercise an informed discretion, a Scottish trial judge would have to be given before the trial much more information than he is given at present. Before he goes into court an English judge, unlike a Scottish judge, is provided with (i) the witnesses' depositions; (ii) any additional evidence served by the prosecution after the committal proceedings; (iii) any documentary exhibits referred to therein, including, for example, photographs of the complainant and the locus *in quo*; (iv) any notice of alibi served by the defendant under section 11 of the Criminal Justice Act 1967; and (v) the accused's record and antecedents.⁸⁸ He is therefore able to assess the evidence which the prosecution proposes to lead and the factors listed in section 25 or 26 of the 1988 Act with the assistance of his pre-trial consideration of these documents. A Scottish judge, on the other hand, is given before the trial only a copy of the indictment, which includes lists of the Crown witnesses and productions, and a copy of any special defence. On occasions, copies of the documentary productions are made available to him before the trial. To give him any further information such as is provided to an English judge would be a major departure from Scottish practice which we could not recommend in the context of this Report.

Our recommended policy

4.47 While we think that in the past the arguments justifying the exclusion of hearsay have been overstated,⁸⁹ we do not intend to cast doubt on the traditional view, which the Scottish system of criminal justice shares with the Anglo-American systems, that ideally information should be presented to a criminal court by witnesses who appear personally before the court, testify on oath from their own direct knowledge and are subject to cross-examination. That view is subject to two obvious qualifications to which the law already gives some effect. First, much information which cannot be presented in that way is likely to be superior to much that is: it is for that reason, among others, that large categories of statements in documents are admissible.⁹⁰ Secondly, other hearsay statements, such as statements by persons who have died, are admitted on the ground of necessity, where they would otherwise be denied to the court or evidence of the same value could not otherwise be obtained.⁹¹

4.48 Our approach will be to confirm the traditional preference for direct oral evidence over hearsay but to provide both for the prosecution and for the defence new categories of

⁸⁷ See paras 4.35, 4.38 above.

⁸⁸ There appear to be few published references to this aspect of English criminal practice. See Glanville Williams, *The Proof of Guilt* (3rd ed, 1963) pp 33-35; *R v Turner* (1970) 54 Cr App R 352 per Lord Parker of Waddington LCJ at p 361; *R v Ryan* (1978) 67 Cr App R 177 per Waller LJ at p 180; Archbold, *Criminal Pleading, Evidence and Practice*, vol 1 (1995), paras 4-76, 4-77 (Farquharson Committee Report).

⁸⁹ See para 4.1 above.

⁹⁰ See para 3.3 above.

⁹¹ See A B Wilkinson, "Hearsay: a Scottish perspective" in *Justice and Crime* ed R F Hunter (1993) 66 at pp 92-93.

exceptions to the hearsay rule which would allow hearsay evidence of a statement to be admitted if there were truly insurmountable difficulties in the way of obtaining the evidence of the maker of the statement from the maker personally, on oath or affirmation in the presence of the jury and subject to cross-examination. We consider that in such cases the need for the information the maker was able to give outweighs the disadvantages of hearsay evidence in the search for the truth of the matters in issue before the court. Necessity alone appears to us to be a sufficient justification for the admission of hearsay. In the United States Wigmore attempted to show that the exceptions to the hearsay rule could be justified by both necessity and reliability: the hearsay evidence which was admissible was necessary, and it was supported by some guarantee of reliability.⁹² His attempt has been regarded as a failure:⁹³ under the present law, much reliable evidence is excluded, and much unreliable evidence is admitted. Hearsay evidence is excluded not because it is unreliable, but because it is not possible to test its reliability by cross-examination. Hearsay which might be admitted on the ground of necessity might vary in reliability, just as direct oral evidence does. In order to take account of that consideration we propose that evidence should be admissible as to the credibility of the maker of the statement and the circumstances in which he or she made the statement and observed the facts mentioned in it. Any factors indicating reliability or unreliability would be matters for the jury to assess in deciding what weight to attach to the statement, a task in which they would be guided by appropriate directions from the judge. If a person has made a statement containing information relevant to an issue at the trial but he cannot be called to give evidence in person, his statement should be admitted at the trial and assessed along with the other evidence adduced.

4.49 In order to take account of the European Convention on Human Rights the new categories of exceptions should be wide enough to enable an accused to lead such hearsay as may reasonably be required for his defence. At the same time the leading of the same categories of hearsay by the prosecution should be permissible provided that circumstances exist in which the European Court of Human Rights would not consider the leading of the hearsay to be a violation of the rights of the accused under the Convention. These circumstances, in our view,⁹⁴ are:

- (1) the prosecution must satisfy the trial judge that the conditions for the admissibility of the statement are met;
- (2) the accused should be entitled to lead evidence in rebuttal of the matters in the statement;
- (3) the accused should know the identity of the maker of the statement and should be entitled to attack his or her credibility: if necessary, the accused should be entitled to lead additional evidence for this purpose;
- (4) the judge should direct the jury (or himself, if sitting in a summary court) as to the factors relevant to the assessment of the hearsay statement; and

⁹² J H Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940), paras 1420-1423, *cit* New South Wales Law Reform Commission, *Report on the Rule against Hearsay* (LRC 29, 1978), para 1.2.17.

⁹³ New South Wales Law Reform Commission, *above*.

⁹⁴ See paras 6.27-6.30 below.

- (5) by virtue of the corroboration requirement the accused could not be convicted on the basis of one unsupported item of hearsay evidence.

4.50 Those five requirements would not place the defence in a specially favoured position. The first four requirements would also apply to the defence where the defence intended to lead hearsay evidence. The fifth is simply an example of the general rule as to corroboration. Thus the five requirements would not disturb the present balance between the prosecution and the defence. In view of the difficulty of predicting the approach of the European Court of Human Rights to any conviction based in part on hearsay evidence, it is not possible to guarantee that a conviction based in part on hearsay evidence led by virtue of our recommended provisions would not be held to be a violation of the Convention. We consider, however, that so long as the five requirements applied there would be a reasonably good prospect that the Court would reject a complaint that the accused had not had a fair trial.

4.51 We also propose that multiple hearsay should not be admissible and that, in order to avoid surprise or delay at the trial, the admissibility of any statement which it is proposed to tender under the recommended provisions should be decided at a preliminary, first or intermediate diet, wherever that is possible. A further proposed safeguard is that a statement should not be admissible if the party tendering it had brought about the unavailability of the maker for the purpose of preventing him from giving evidence.

4.52 We explain these recommendations fully in Parts V and VI. In Part VII we propose that a statement made by a witness before he or she appears in court should be admissible as evidence of the truth of its contents where it was made in a precognition on oath or in prior court proceedings, or where the statement is contained in a document and the witness agrees to adopt it as his or her evidence. None of our recommendations affects the admissibility of statements which are admissible under the present law. We make no recommendations as to the admissibility of prior statements by accused persons.

Part V Exceptions for statements by persons whose evidence is not available

Introduction

5.1 In Part IV we expressed the view that ideally information should be presented to the criminal court by witnesses who appear personally before the court, testify on oath¹ from their own direct knowledge and are subject to cross-examination.² We expressed a preference for such direct evidence in court over hearsay evidence, and for hearsay evidence over a complete loss of evidence.³ We explained that our approach would be to confirm the traditional preference for direct evidence over hearsay but to provide new categories of exceptions to the hearsay rule which would allow hearsay evidence of a statement to be admitted if there were truly insurmountable difficulties in the way of obtaining the direct evidence of the maker of the statement in court.⁴ We proposed that multiple hearsay should not be admissible; an application to adduce a statement falling within any of the new exceptions should be made at a pre-trial diet, where possible; a statement should not be admissible if the applicant had brought about the unavailability of the maker's evidence;⁵ and where a statement was admitted, evidence should be admissible at the trial as to the credibility of the maker and the circumstances in which he or she had observed the facts mentioned in the statement and in which he or she made the statement.⁶

5.2 In this Part we shall explain these proposals in detail. We shall begin with a discussion of definitions. In this Report and in the draft Bill in Appendix A we use the expressions "statement", "document" and "statement contained in a document". We shall consider the meanings these terms should have in the context of the proposed exceptions to the hearsay rule.⁷ We shall also consider the extent to which a hearsay statement should be admissible under these exceptions⁸ and how it should be proved.⁹ Next we shall explain each of the proposed exceptions.¹⁰ We shall recommend that a statement should not be admissible if the party tendering it has procured the unavailability of the evidence of the maker of the statement.¹¹ We shall explain the effect of our recommendations on the rule that an accused cannot prove a confession by a third party that the third party committed the crime for which the accused is on trial.¹² We shall conclude this Part by indicating certain categories of

¹ For the sake of brevity "oath" hereafter includes "affirmation".

² See para 4.47 above.

³ See paras 4.1, 4.47 above.

⁴ See para 4.48 above.

⁵ See para 4.51 above.

⁶ See para 4.49 above.

⁷ See paras 5.4-5.20 below.

⁸ See paras 5.25-5.28 below.

⁹ See paras 5.21-5.24 below.

¹⁰ See paras 5.29-5.62 below.

¹¹ See paras 5.63-5.64 below.

¹² See paras 5.65-5.69 below.

hearsay statements which are inadmissible under the present law and would continue to be inadmissible if our recommendations were implemented. In particular, our recommendations do not affect the present law as to statements by the accused.¹³ Part VI will be concerned with the practical effects of the use of the proposed exceptions: the application procedure,¹⁴ opportunities to test the maker's credibility and reliability¹⁵ and the direction of the jury by the trial judge.¹⁶ Finally we shall test our proposals against the requirements of the European Convention on Human Rights.¹⁷

5.3 The exceptions to the hearsay rule which we recommend in this Report would not be the only exceptions to the rule. Hearsay which is admissible under the present law by virtue of the existing exceptions to the rule¹⁸ would continue to be admissible. Our recommendations are intended to clarify some of the existing exceptions and to supplement them with other, new, exceptions. They are not intended to exclude any of the existing exceptions, or the creation of further exceptions by judicial development of the law,¹⁹ or the admission of hearsay by agreement of the parties in a particular trial. Accordingly our first **recommendation** is:

1. **Nothing in the statutory provisions enacting the recommendations in this Report should prejudice the admissibility of any evidence that would be admissible apart from these provisions.**

(Draft Bill, clause 3(5))

Definitions

"Statement"

5.4 The word "statement" has been recently defined in the Civil Evidence (Scotland) Act 1988 and in the Prisoners and Criminal Proceedings (Scotland) Act 1993. Section 9 of the 1988 Act provides:

"statement' includes any representation (however made or expressed) of fact or opinion but does not include a statement in a precognition."

Paragraph 8 of Schedule 3 to the 1993 Act provides an expanded version of that definition, adapted for the purposes of the "statements in business documents" exception to the hearsay rule which is enacted by other provisions of Schedule 3. Paragraph 8 provides:

"statement' includes any representation (however made or expressed) of fact or opinion ... but ... does not include ... -

(a) a statement in a precognition"

¹³ See paras 5.70-5.80 below.

¹⁴ See paras 6.3-6.11 below.

¹⁵ See paras 6.12-6.23 below.

¹⁶ See paras 6.24-6.26 below.

¹⁷ See paras 6.27-6.30 below.

¹⁸ See para 3.3 above.

¹⁹ See paras 3.6, 4.20 above.

As we noted in our *Report on Documentary Evidence*,²⁰ that definition in the 1988 Act gives effect to two of the views expressed in our *Report on Corroboration, Hearsay and Related Matters in Civil Proceedings*: that a statement made on precognition should remain inadmissible as evidence of any matter mentioned in the statement;²¹ and that a hearsay statement of opinion should be admissible if the statement of opinion would be admissible if given in direct oral evidence by its maker.²² As to statements made on precognition, it has often been pointed out that a precognition is not the witness's own narrative but a version by the precognoscer of the witness's answers to questions put by him; and that even if the precognoscer has not consciously tried to get the witness to tell his story in the way most favourable to the party in whose interest it is taken, it is likely that the precognition will be expressed in that way.²³ On consultation, a proposition in the Discussion Paper that statements on precognition should continue to be inadmissible²⁴ was supported by the majority but disagreement or reservations were expressed by some experienced consultees in the minority. Some considered that statements on precognition were more accurate than statements taken by the police, and others referred to the absence of an authoritative definition of the expression "precognition" and the difficulty in determining whether any given statement was of the nature of a precognition, a question which arises quite frequently in practice.²⁵ It might be possible to contemplate rules for the admissibility of statements on precognition in the event of changes in practice as to the way in which precognitions are taken. It might be suggested, for example, that where the statement had been fully and accurately recorded in question and answer form there would be no room for glosses by the precognoscer or for any doubt as to what the witness had said or the circumstances in which he had said it. No changes in the present law and practice were proposed in the Discussion Paper, however, and there was insufficient support for any changes on consultation.

Precognitions on oath

5.5 We consider that a statement in a precognition on oath is in a special position. Precognition on oath is a procedure whereby a person whom it is proposed to cite as a witness at a criminal trial is brought before the sheriff in chambers and examined on oath. An application for precognition on oath may be made either by the prosecutor or by the defence.²⁶ Usually the application is made by the prosecution and the witness is examined by the procurator fiscal. The questions and answers are recorded verbatim by a short-hand writer and are transcribed. The transcript (also called a "precognition on oath") is certified by the shorthand writer and is read over and signed by the witness and the sheriff. Accordingly it is not open to the criticisms which may be made of a precognition in conventional form which is an unsworn, unsigned narrative prepared by the precognoscer setting out the latter's understanding of the evidence the person may be expected to give in court. With a signed and certified precognition on oath there is no room for any reasonable doubt as to what the witness said, the questions which elicited what he said or the circumstances in

²⁰ (1992) Scot Law Com No 137, para 2.15.

²¹ (1986) Scot Law Com No 100, para 3.57.

²² *Ibid*, para 3.61.

²³ *Kerr v HMA* 1958 JC 14, 1958 SLT 82 per L J-C Thomson at pp 18-19, 84, *cit* DP, para 3.45.

²⁴ DP, paras 3.45, 3.46, prop 5.

²⁵ Recent cases include *HMA v McGachy* 1991 SLT 921, 1991 SCCR 884; and, under s 9 of the 1988 Act, *Highland Venison Mkt Ltd v Allwild GmbH* 1992 SLT 1127, 1992 SCLR 415; *Anderson v Jas B Fraser & Co Ltd* 1992 SLT 1129, 1992 SCLR 417; *F v Kennedy (No 2)* 1993 SLT 1284, 1992 SCLR 750; *McAvoy v Glasgow District Council* 1993 SLT 859, 1993 SCLR 393.

²⁶ Criminal Justice (Scotland) Act 1980, s 9(1).

which he said it: his statements are made on oath, and the control of the proceedings by the sheriff should secure that the questioning is fair and the witness is not oppressively treated. Similar considerations have led the High Court to hold that a precognition on oath, unlike other precognitions, may be used to challenge a witness's evidence in court on the ground that he has made a previous statement inconsistent with his evidence.²⁷ We propose that in the definition of "statement" in the draft Bill statements in precognitions on oath should form an exception to the rule that statements in precognitions should be inadmissible.

Representations

5.6 In making representations of opinion admissible the Civil Evidence (Scotland) Act 1988 differs from the Criminal Evidence Act 1965 which applies only to statements which are representations of fact.²⁸ As in our *Report on Documentary Evidence*,²⁹ we see no reason why our proposals should not apply to statements of opinion as well as to statements of fact, provided that the statement of opinion would be admissible if given in direct oral evidence by the maker, a condition which we discuss below.³⁰ We also think that it would be convenient to make it clear that "statement" includes any part of a statement.

5.7 In the definitions in the Acts of 1988 and 1993 the words "any representation (however made or expressed)" take account of the fact that the hearsay rule applies not only to statements made orally but also to statements made in documents and to statements made by means of conduct such as signs or gestures.³¹ We propose that the same words should appear in the definition of "statement" in the draft Bill.

Implied assertions

5.8 The formulation of the hearsay rule quoted in paragraph 3.2 above refers to "Any assertion other than one made by a person while giving oral evidence ...". It is clear that no rational distinction can be drawn between statements intended to be assertive, and conduct intended to be assertive.³² In other jurisdictions but not, apparently, in Scotland, the question has arisen whether the hearsay rule extends to statements or conduct not intended by the maker or actor to assert a particular fact, but from which his belief in the existence of that fact can be inferred since his belief is implicit in his statement or conduct. His belief is regarded as an implied assertion of the fact. It is said that if, for example, A greets someone in the street with the words "Hello, X!", that statement implies an assertion by A that the person he is addressing is X and therefore, by the operation of the hearsay rule, cannot be admitted as evidence to prove that X was in the street at that time. Again, if B is seen at midnight running out of a building, seizing a fire extinguisher and running in again, that conduct implies an assertion by B that the building is on fire and is excluded by the hearsay rule as evidence that the building was on fire prior to midnight.

²⁷ *Coll, Petitioner* 1977 JC 29, 1977 SLT 58, a decision on the Evidence (Scotland) Act 1852, s 3 (now replaced by the Criminal Procedure (Scotland) Act 1975, ss 147, 349: see para 7.17 below).

²⁸ Criminal Evidence Act 1965, s 1(4). The same definition of "statement" appeared in s 6(1) of the (English) Evidence Act 1938 (1 & 2 Geo VI, c 28) and s 10(1) of the (English) Civil Evidence Act 1968, c 64. It was expanded to include statements of opinion by s 1(1) of the (English) Civil Evidence Act 1972, c 30 and imported into the Police and Criminal Evidence Act 1984 (by s 72(1)) and the Criminal Justice Act 1988 (by s 28(2), Sched 2, para 5).

²⁹ (1992) Scot Law Com No 137, para 2.20.

³⁰ See para 5.25 below.

³¹ See para 3.2 above.

³² *Chandrasekera v R* [1937] AC 220.

5.9 In other jurisdictions the question whether implied assertions fall within the hearsay rule has been the subject of judicial decisions which are not easy to reconcile and of much academic discussion. Many differing views have been expressed.³³ One view is that all "implied assertions", whether implied by words or conduct, are hearsay and inadmissible unless they fall within an existing exception to the hearsay rule, for example as statements forming part of the *res gestae*. This view is justified by the consideration that while implied assertions are much more likely to be free from the risk of deliberate lying than express assertions, they might be unreliable because the maker or actor was mistaken as to the matter asserted: in the examples in the previous paragraph, A might have been mistaken in identifying the person as X, and B might have been mistaken in thinking that the building was on fire. Another view is that implied assertions are inadmissible, but new exceptions to the hearsay rule should be created in order to make implied assertions admissible where they appear to be reliable, for example where the assertion is to the disadvantage of the maker or actor or where he has based an important decision on the matter impliedly asserted. A third view draws a distinction between assertions implied in statements and those implied in conduct and treats only the former as inadmissible hearsay. A fourth is that all implied assertions are inadmissible hearsay unless the assertion is concerned with something the maker or actor himself has done or not done. A fifth view is that no implied assertion is hearsay.

5.10 Modern codes of evidence tend to adopt the view that implied assertions are not hearsay. For example, the Federal Rules of Evidence define "statement" as

"(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."³⁴

In the Law Reform Commission of Canada's Evidence Code:

"'statement' means an oral or written assertion or non-verbal conduct of a person intended by him as an assertion."³⁵

In the Evidence Bill currently before the Parliament of the Commonwealth of Australia clause 59(1) states the hearsay rule as follows:

"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 the representation."

5.11 The question whether implied assertions are hearsay does not seem to have arisen in Scotland.³⁶ It may be that in Scottish practice much evidence of implied assertions is led without objection either because it is admissible under an exception to the hearsay rule or because it does not occur to the opponent of the party tendering the evidence that it might be hearsay. On the other hand it may be that evidence of implied assertions is admitted in practice because Scottish judges and practitioners assume that in the law of Scotland implied assertions are not hearsay. It may be significant that in *Lord Advocate's Reference (No 1 of 1992)*³⁷ the Lord Justice-General appeared to indicate approval of the dissenting speeches in

³³ See New South Wales Law Reform Commission, *Report on the Rule Against Hearsay* (LRC 29, 1978), pp 66-71.

³⁴ Federal Rules of Evidence (1975), rule 801(a); see also American Law Institute, *Model Code of Evidence* (1942), rule 501(1).

³⁵ *Report on Evidence* (1977), Evidence Code, cl 27(2)(b).

³⁶ A B Wilkinson, *The Scottish Law of Evidence* (1986), pp 37-38.

³⁷ 1992 SLT 1010 at pp 1016-1017, 1992 SCCR 724 at p 741.

R v Kearley.³⁸ In *Kearley* the House of Lords held by a majority that the hearsay rule extended to implied assertions. Evidence of requests for drugs made at the defendant's house by callers on the telephone and in person was held to be inadmissible hearsay when tendered to prove that drugs were being supplied from the defendant's house or that he was dealing in drugs. The decision has been much criticised.³⁹

5.12 It appears to us that there is much to be said for the view that implied assertions are not hearsay. Since a person who is not deliberately making an assertion is seldom likely to be engaged in deception, at least one of the dangers associated with hearsay is generally absent. Again, every human utterance or action could be argued to be an implied assertion of something, including an assertion of the speaker's or actor's intention, state of mind or belief. As Lord Browne-Wilkinson pointed out in *R v Kearley*:

"Any action involving human activity necessarily implies that the human being had reasons and beliefs on which his action was based."⁴⁰

Much relevant evidence could be excluded upon an analysis of it as an implied assertion. A further consideration is that an express assertion is much easier to recognise than an implied assertion: the former may be more readily detected by an advocate and excluded by the judge. We agree with the editor of Cross that

"concentration upon the presence of an intention to assert provides the most defensible watershed between hearsay and non-hearsay both as a matter of logical coherence and of practical common-sense."⁴¹

5.13 That an "assertion" can be anything other than something intentionally asserted or that something is "implied" in a statement or action when it is not implied by the maker or actor are concepts which are difficult to accept and with which Scottish lawyers appear to be unfamiliar. In Scotland, evidence supplied by implied assertions seems to be admissible under the present law and in our view it should continue to be so. We therefore consider that it is unnecessary to depart from the substance of the definition of "statement" in the Acts of 1988 and 1993 which appear to us to reflect the natural meaning of "statement" and not to invite any analysis of whether any particular language or conduct was "intended"⁴² as an assertion or was an "implied assertion".

"Document"; "film"

5.14 In clause 3(4) of the draft Bill annexed to this Report, "document" is defined in the following terms:

"document" includes, in addition to a document in writing -

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

³⁸ [1992] 2 AC 228.

³⁹ Eg C Tapper, "Hearsay and implied assertions" (1992) 108 LQR 524; J R Spencer, "Hearsay, relevance and implied assertions" [1993] Cambridge Law Journal 40; R Pattenden, "Conceptual versus pragmatic approaches to hearsay" (1993) 56 MLR 138; A Rein, "The scope of hearsay" (1994) 110 LQR 431.

⁴⁰ [1992] 2 AC 228 at p 280.

⁴¹ Cross, p 517.

⁴² As in the American, Canadian and Australian provisions quoted in para 5.10 above.

- (b) any photograph;
- (c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are recorded so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
- (d) any film, negative, tape, disc or other device in which one or more visual images are recorded so as to be capable (as aforesaid) of being reproduced therefrom;"

Clause 3(4) further provides that "film" includes a microfilm. These definitions also appear in section 9 of the Civil Evidence (Scotland) Act 1988 (without the word "disc" in subparagraph (d)) and in paragraph 8 of Schedule 3 to the Prisoners and Criminal Proceedings (Scotland) Act 1993. They are intended to render admissible statements in documents of all kinds.⁴³ We consider that in the interests of consistency they should be repeated in the draft Bill.

Copies of documents

5.15 A copy of a document is admissible for the purposes of any criminal proceedings by virtue of paragraph 1 of Schedule 3 to the 1993 Act. Paragraph 1 provides that unless the court otherwise directs, a copy of a document, or of a material part of any document, is to be deemed a true copy and treated for evidential purposes as if it were the document or material part itself, whether the document is still in existence or not and however many removes there may be between the copy produced and the original, provided that that copy purports to be authenticated⁴⁴ in such manner and by such person as may be prescribed.⁴⁵

"Statement contained in a document"

5.16 We propose that the statements which we recommend should be admissible must be either contained in a document or reported to the court by a witness who personally heard or saw the words or conduct of the maker of the statement. We discuss the latter requirement in subsequent paragraphs.⁴⁶ Here we explain what we mean by "a statement contained in a document".⁴⁷ We consider that a statement should be regarded as "contained in a document" if any one of three conditions is fulfilled.

5.17 First, the person who made the statement should have made the statement in the document personally. A person who makes a statement by writing it down himself obviously produces a statement contained in a document. "Document", however, is deliberately given a very wide definition in clause 3(4) which is intended to cover any means which enable a person's actual words to be recorded and preserved. Thus a person who operates a tape recorder or a video camera and dictates a statement into the tape recorder or

⁴³ (1986) Scot Law Com No 100, para 3.62; (1992) Scot Law Com No 137, para 2.18.

⁴⁴ *Ie* authenticated as a true copy of the original: *Ventouris v Mountain (No 2)* [1992] 1 WLR 887, [1992] 3 All ER 414.

⁴⁵ Para 1 is derived from recommendation 19 of our *Report on Documentary Evidence*: see (1992) Scot Law Com No 137, paras 3.9-3.21 and the explanatory notes to cl 4 of the draft Bill annexed to that Report.

⁴⁶ See paras 5.21-5.24 below.

⁴⁷ Here we draw on Glanville Williams, "The new proposals in relation to double hearsay and records" [1973] Crim L R 139 at p 151.

utters words in front of the video camera also produces a statement contained in a document in the form of the audio tape or video tape. A person who draws a plan or makes a drawing also makes a statement in a document personally: he is representing a state of affairs in something which is included in the definition of "document".

5.18 The second condition applies where the statement is contained in a document produced by someone other than the maker of the statement. Our proposed condition is that the maker should have approved the document as embodying his statement. If he has done so, the document should be admissible as evidence of his statement. We envisage that his approval of the document need not be proved by his signature of it: the document might not be a paper document, or if it is, he might be unable to sign it owing to some physical disability but might nevertheless be able to indicate his approval by speech or otherwise.⁴⁸ Any question as to whether he had approved the document would be determined by the judge at the pre-trial hearing of the application for the admission of the statement.⁴⁹

5.19 We do not think it should be necessary, however, for the document to be produced with the knowledge of the maker of the statement, or for it to be approved by him. If the maker knows that his statement is being embodied in a document, that might cause him to make the statement with particular care and thus might be a factor adding to the weight of the statement. Approval by the maker might also go to the weight of the statement. The essential point, however, is that the statement was made, not that the maker knew it was being recorded or that he approved the record. We would therefore admit not only a statement in a document made or approved by the maker but also a statement recorded in a document either directly by mechanical means or indirectly where someone who heard the statement produced the document afterwards, for example by writing down the words uttered or typing them or repeating them into a tape recorder. We do not recommend that there should be any limit on the time within which the document must be produced by the listener. Clause 31(6) of the Criminal Law Revision Committee's draft Bill requires an oral statement to be reduced into writing by a person who heard it "at the time or reasonably soon afterwards". On this matter we agree with the views of Dr Glanville Williams.⁵⁰

"To fall within the definition in clause 31(6), Y must write down X's statement 'at the time or reasonably soon afterwards'. This does not represent the general understanding of language. If an employer dictates a letter to his secretary, telling her to sign it for him and send it off, the fact that she delays an unreasonable time before sending it would not make the letter any the less the employer's letter as a matter of law. Since clause 31(6) does not purport to give an exhaustive definition, it may perhaps be argued that the letter would be the employer's document without recourse to clause 31(6), and would therefore be unaffected by the time restriction in that subclause. But this would appear to make the time restriction almost totally ineffective.

"Let us assume, however, that the restriction is effective. The majority of the Committee thought that a limitation was necessary in order to guard against errors of memory. But its effect may be to exclude cogent evidence. Suppose that X, when dying as a result of a criminal attack, tells Y the circumstances of the attack and the name of the attacker and asks him to write down what he has been told and give the

⁴⁸ *R v McGillivray* (1993) 97 Cr App R 232.

⁴⁹ See para 6.11 below.

⁵⁰ Glanville Williams, "The new proposals in relation to double hearsay and records" [1973] Crim L R 139 at pp 149-150.

information to the police. X dies, and Y, who is in two minds whether to comply with X's request or not, does nothing for a couple of weeks, but then makes the written statement to the police, after which he dies or leaves the country. Under the Bill Y's statement cannot be given in evidence, even though the facts were so simple and dramatic that Y could hardly have misremembered them, and even though the story is corroborated in many particulars by other evidence.

"If in the above circumstances Y lived to give evidence, his evidence on oath would be acceptable even though he took no note and even though the trial did not take place for many months after X's death. The evidence would not be regarded as vitiated by this lapse of months. Yet Y's written evidence is, under the Bill, vitiated by the lapse of anything beyond a 'reasonable' time for making the memorandum, even a few days, presumably because he may have forgotten the full facts in the meantime. Is there any real sense in this?"

The fact that the indirect, non-mechanical recording of the statement by the listener was made at the same time as or reasonably soon after the making of the statement would often be an indication, although not a guarantee, that the document gave a substantially complete and accurate account of what the maker had said. Evidence of the circumstances in which the listener compiled the document would be admissible at the trial and would go to the weight to be attached to it. For example, much weight would normally be attached to a certified copy of the transcript of the official shorthand notes of a person's evidence in an earlier trial. Our third condition accordingly is that the statement should have been embodied in a document by whatever means or by any person, with or without the knowledge of the maker of the statement.

5.20 We therefore **recommend**:

2. The following definitions should be adopted:

(a) "statement" should include -

- (i) any representation, however made or expressed, of fact or opinion, and**
- (ii) any part of a statement,**

but should not include a statement in a precognition other than a precognition on oath;

(b) "document" and "film" should be defined as in paragraph 8 of Schedule 3 to the Prisoners and Criminal Proceedings (Scotland) Act 1993;

(c) a "statement contained in a document" should be a statement the maker of which -

- (i) makes the statement in a document personally,**
- (ii) approves a document as embodying the statement, or**

- (iii) **makes a statement which is embodied in a document with or without his knowledge, by whatever means or by any person.**

(Draft Bill, clause 3(1), (2), (3), (4))

Evidence of the statement

5.21 In the Discussion Paper we asked whether any statement which might be admissible under any new exception to the hearsay rule should be admissible (a) where the maker of the statement had recorded his words in a document, or where his words had been recorded verbatim by someone else, or (b) where oral evidence of the statement could be given by a witness who had direct personal knowledge of the making of the statement.⁵¹ There was no consensus among those who responded as to which of these means of proving the statement should be preferred. We have concluded that a statement which would be admissible under any proposed new exception to the hearsay rule should be capable of being proved either (a) where the statement is "contained in a document" as we have defined that expression above,⁵² or (b) where a witness who has personally perceived the statement being made repeats it orally to the court from the witness box. We have already explained why we recommend the admission of a statement "contained in a document". We now state why we propose that oral evidence of the making of a statement made otherwise than in a document should be restricted to first-hand evidence. By "a statement made otherwise than in a document" we mean a statement made orally or by conduct. For convenience, in the following paragraphs we shall generally refer only to statements made orally.

Oral hearsay

5.22 We do not think that it would be satisfactory to exclude oral evidence of the making of a statement by words or conduct. In England and Wales oral evidence is not admitted under Part II of the Criminal Justice Act 1988, which provides only for the admission of "first-hand" documentary evidence. Commentators have questioned why the scope of the Act should be limited in that way.⁵³ The principal disadvantage of hearsay is the same for both oral and documentary evidence: it is not possible to test by cross-examination of the alleged maker of the statement whether he actually made it and, if he did, what he meant and whether he was lying or mistaken. It does not seem justifiable to assume that all first-hand documentary evidence is more reliable than statements made orally, no matter how clear a witness's evidence would be as to the terms in which an oral statement had been made.

Exclusion of multiple hearsay

5.23 If, however, oral evidence of the making of an oral statement is to be admissible, we consider that such evidence should only be the first-hand evidence of a witness who personally heard the statement being made, telling the court what he or she heard. Where A has made an oral statement which is heard by B, it should be possible for B to tell the court what he heard A say. It should not be possible, however, to call C to give evidence that B

⁵¹ DP, paras 3.20, 3.27, prop 3(2).

⁵² See paras 5.16-5.20 above.

⁵³ Di Birch, "The Criminal Justice Act 1988: (2) Documentary evidence" [1989] Crim L R 15 at p 20.

had told him what A said, because the court would generally have no means of assessing the weight to be attached to B's statement. It is possible to envisage cases in which such "double hearsay" might be reliable;⁵⁴ and not only double hearsay but also more remote hearsay (where the statement is transmitted from A to the court through a succession of intermediaries) is admissible in civil cases by virtue of the Civil Evidence (Scotland) Act 1988, which admits "hearsay of whatever degree".⁵⁵ We consider, however, that if any degree of hearsay more remote than first-hand hearsay were to be admissible in a criminal trial, there would be a substantial risk that unreliable or manufactured evidence might be admitted and the jury might be misled and distracted, while disproportionate time and expense were consumed, by evidence and submissions as to its origins and weight.

5.24 We therefore **recommend**:

3. **Any statement admissible by virtue of any of the exceptions to the hearsay rule recommended in this Part either -**
 - (a) **must be contained in a document; or**
 - (b) **if made otherwise than in a document, must be the subject of oral evidence in court by a witness who had direct personal knowledge of the making of the statement.**

(Draft Bill, clause 1(2))

Extent to which the statement should be admissible

5.25 We now consider the extent to which a statement to which our recommendations later in this Part apply should be admissible. We propose that it should be admissible as evidence of any fact, opinion or other matter⁵⁶ contained in it, subject to one condition. That condition is that if the maker of the statement gave evidence about that matter at the trial, his evidence would be unobjectionable. Here we follow the pattern of other legislation on the admissibility of hearsay.⁵⁷ The effect of our proposal is that the statement will be admissible only if evidence of the matter in it, given orally in court by the maker himself, would be admissible. Thus the admission of the statement, or of a part of the statement, may be objected to on any ground on which objection might be taken to the maker's evidence in court on the matter dealt with in the statement, or in that part of the statement.

5.26 The fact that the statement itself is hearsay because it is a statement made other than in oral evidence in the proceedings would not be a valid ground of objection, because the statement would fall within one of the new statutory exceptions to the hearsay rule. If the statement itself *contains* hearsay, what would be the position? If the hearsay contained in the

⁵⁴ Glanville Williams, "The new proposals in relation to double hearsay and records" [1973] Crim L R 139 at pp 139-140.

⁵⁵ 1988 Act, ss 2, 9.

⁵⁶ "Matter" in cl 1(1) of the draft Bill is wider than "fact or opinion" in the definition of "statement" in cl 3(1)(a) and might include, for example, an utterance such as a question or an exclamation which was neither a fact nor an opinion and which might not be admissible under any of the present exceptions to the hearsay rule.

⁵⁷ Civil Evidence Act 1968, ss 2(1), 3(1), 4(1), 5(1); Civil Evidence Act 1972, s 1(2); Civil Evidence (Scotland) Act 1988, s 2(1)(b); Prisoners and Criminal Proceedings (Scotland) Act 1993, Sched 3, para 2(1). We think it would be pedantic to object to the concept of the maker of a statement who has been murdered giving direct oral evidence at the trial of his alleged murderer (see Cross, p 553).

statement fell within an exception to the hearsay rule, such as a statement forming part of the *res gestae*, it would be admissible, because the maker of the statement, if he were to give evidence in the course of the proceedings, would be entitled to give evidence of the *res gestae* statement. Similarly, if the hearsay did not fall within one of the exceptions, that part of the statement would be inadmissible.⁵⁸ If the statement itself contained evidence of the making of some other statement by another person and the purpose of adducing that evidence was to establish, not the truth of the other statement, but the fact that it was made, the evidence of the making of the other statement would not be hearsay and would be admissible provided that it was relevant and was not otherwise objectionable. That is so because that would have been the position if the maker of the statement had been asked to give evidence in the witness box about the making of the other statement.⁵⁹ Again, if the statement contains an expression of opinion by the maker of the statement, that part of the statement will be inadmissible if the maker's opinion on the matter would have been inadmissible had he expressed it personally in court: otherwise, it will be admissible.

Competency of the maker of the statement

5.27 The condition that direct oral evidence of the matter by the maker of the statement would be admissible requires that the maker should be a competent witness, since otherwise his evidence would be wholly inadmissible. We consider that it would be desirable to make some express provision as to the date as at which his competence is to be tested. There is no provision on this matter in the Civil Evidence (Scotland) Act 1988. At common law the relevant date was for long unsettled,⁶⁰ but dicta in recent appeals to the Court of Session under the Social Work (Scotland) Act 1968 appear to indicate that it may well be the law that the maker of the statement must have been a competent witness at the time when he made the statement.⁶¹ We are in no doubt that that should be the law in relation to the maker of any statement which would be admissible by virtue of any of our recommended exceptions to the hearsay rule. Where the maker of the statement was over 14 years of age at the date when he or she made the statement, no question as to his or her competence should generally arise.⁶² Where, however, he or she was under that age or suffered, or has since suffered, some degree of mental or physical incapacity, his or her competence at that date should be established, if necessary by leading evidence on the point.

5.28 We accordingly **recommend**:

4. (1) **A statement falling within any of the exceptions to the hearsay rule recommended in this Part should be admissible as evidence of any matter stated in it of which direct oral evidence by the maker of the statement would be admissible if given in the course of the proceedings.**

⁵⁸ Cf *Re Koscot Interplanetary (UK) Ltd, Re Koscot AG* [1972] 3 All ER 829; *The Ymnos* [1981] 1 Lloyd's Rep 550.

⁵⁹ *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at p 970.

⁶⁰ Dickson, para 266; *Deans's Judicial Factor v Deans* 1912 SC 441, 1912 1 SLT 197 per LP Dunedin at pp 448, 200-201.

⁶¹ *M v Kennedy* 1993 SCLR 69 at pp 77-78; *M v Ferguson* 1994 SCLR 487 at p 492.

⁶² It is generally unnecessary for the trial judge to inquire into the competence of a person over 14 who is tendered as a witness: *Leung v MacNeill* 1994 GWD 8-447; *Quinn v Lees* 1994 SCCR 159. In *Ferguson v S* 1993 SCLR 712 there was apparently no inquiry into the competence of the maker of the two video-recorded statements, made when she was just under and just over 15 years of age.

(2) The statement should not be admissible unless the maker of the statement would have been a competent witness at the time the statement was made.

(Draft Bill, clause 1(1), (3))

The exceptions

5.29 The principal common law exceptions to the hearsay rule have been said to be (1) extrajudicial statements against interest by accused persons;⁶³ (2) statements forming part of the *res gestae*; (3) statements made in the presence of the accused; (4) statements by persons identifying or describing a person as the person who committed the offence charged; and (5) statements made by persons who by the time of the trial are deceased or, perhaps, permanently insane or prisoners of war.⁶⁴ In the Discussion Paper we expressed the view that the law applicable to statements in the first two categories could best be left to the courts.⁶⁵ Our consultees did not dissent from that view. We consider that the same view may be taken of statements in the third category: a statement made in the presence of the accused or, more exactly, an adverse inference from his silence on hearing a statement to his prejudice, is seldom relied on in practice. Statements in the fourth category are generally prior statements by witnesses who give evidence in court, and are therefore considered in Part VII.

5.30 The Discussion Paper concentrated on statements in the fifth category. Under the present law an exception to the hearsay rule is made where by the time of the trial a person who would have been a competent witness is dead or, perhaps, permanently insane or a prisoner of war.⁶⁶ A statement⁶⁷ made by such a person will be admissible as evidence of the facts stated in it unless the circumstances raise a presumption that it does not truly reflect what was in his mind.⁶⁸ The factor which is common to those three situations is that the evidence of the maker of the statement is not available to the court: he cannot appear at the trial and give evidence before the jury in person. We consider that it is difficult to understand why the law should admit an exception to the hearsay rule where the maker of the statement is dead but not where his evidence is unavailable for some other very good reason. It appears to us that wherever a person's evidence cannot be obtained for some very good reason, hearsay evidence of a statement by him should be admissible on the ground of necessity. That is the ground on which statements by persons who have died are admitted.⁶⁹ We consider that while a person's direct oral evidence in court is to be preferred to hearsay, hearsay is to be preferred to a complete loss of relevant information if his evidence in court is unavailable. The disadvantages which are involved in the absence of the maker of the statement, including the lack of an opportunity for cross-examination, are in our view a

⁶³ A total acknowledgement of guilt is generally described as a "confession", and an inculpatory statement falling short of that as an "admission".

⁶⁴ 10 *Stair Memorial Encyclopaedia* paras 709-713, 719-745.

⁶⁵ DP, para 3.12.

⁶⁶ There appears to be no authority as to the permanently insane (Dickson, para 268), and only ancient civil authority as to prisoners of war (*Cleland's Creditors* (1708) Mor 12634): see *HMA v Monson* (1893) 1 Adam 114, 21 R (J) 5 per LJ-C Macdonald at pp 132-133, 9-10.

⁶⁷ Other than a statement made in a precognition or with a view to constituting evidence: *Traynor's Executrix v Bairds and Scottish Steel Ltd* 1957 SC 311, 1957 SLT 71; *Pirie v Geddes* 1973 SLT (Sh Ct) 81; *Thomson v Jamieson* 1986 SLT 72.

⁶⁸ A G Walker and N M L Walker, *The Law of Evidence in Scotland* (1964, hereafter "Walker and Walker"), para 372.

⁶⁹ See para 4.47 above.

price that must be paid for the advantage of access to what may be the best available information, or even the only available information, about an issue the court has to decide.

5.31 We propose, however, that hearsay should be admissible only if the difficulties in the way of obtaining a person's evidence are truly insurmountable, and if a number of safeguards against abuse are in place. The exceptions which we are about to propose are in our view the clearest examples of circumstances in which it is necessary to admit hearsay because the maker of the statement cannot be required to give evidence in person. Shortly stated, they are that the maker of the statement (1) is dead; (2) is ill; (3) is abroad; (4) cannot be found; (5) is brought to court but (a) refuses to be sworn or, having taken the oath, (b) successfully claims the privilege against self-incrimination or (c) refuses to answer questions.⁷⁰ Each of these cases is more precisely defined in the following paragraphs and in the provisions of the draft Bill.

5.32 The safeguards which we propose are the following. First, an application to adduce a statement falling within any of the new exceptions must be made to the court, in most cases at a pre-trial diet. Secondly, a statement should not be admissible if the applicant has brought about the unavailability of the maker's evidence. Thirdly, where a statement is admitted it must be proved either by the production of a document in which it is contained or by first-hand oral evidence. Fourthly, evidence should be admissible at the trial as to the credibility of the maker of the statement and the circumstances in which he or she made the statement and observed the facts mentioned in it. Lastly, the jury should receive from the trial judge appropriate directions as to the assessment of the weight of the statement.

5.33 In the following paragraphs we shall discuss the situations for which we propose that new statutory exceptions to the hearsay rule should be provided. We shall consider the safeguards in later paragraphs.

Death

5.34 Our proposed first exception applies where the maker of the statement is dead. Under the present law, as we have already noted,⁷¹ a statement by a deceased person is admissible unless the circumstances raise a presumption that it does not truly reflect what was in his mind. The latter qualification does not seem to apply to a statement in a dying deposition, perhaps because such a deposition is taken on oath before a sheriff.⁷² It has nevertheless been known for a witness who has survived until the trial to give a different story in the witness box from that given in his dying deposition.⁷³ Dying depositions appear to be admissible only in trials for the murder or culpable homicide of the deponent. If a statement is made in a dying declaration, that is, in an unsworn statement taken down in

⁷⁰ Exceptions (1) to (4) were proposed in DP, para 3.27, prop 3(1)(a), (b) and (d). In prop 3(1)(c) we asked whether there should be an exception where the maker could not reasonably be expected to have any recollection of the matters dealt with in the statement (cf the Criminal Justice Act 1988, s 24(4)(a)(iii)). On consultation the weight of opinion was against such an exception, but several consultees suggested that the statement might be admissible if the maker appeared as a witness. We recommend later that a witness whose recollection has been dimmed should be entitled to adopt a prior statement: see paras 7.39-7.49 below.

⁷¹ See para 5.30 above.

⁷² See Dickson, paras 1754-1756; R W Renton and H H Brown, *Criminal Procedure according to the Law of Scotland* (5th edn, 1983, ed G H Gordon, updated by supplements, hereafter "Renton and Brown"), paras 7-42, 7-43; I D Macphail, *Evidence* (1987, hereafter "Macphail"), paras 19.33-19.37.

⁷³ J M Lees, "Dying Depositions" (1885) 1 Sc L Rev 181 at p 189.

writing by any credible person, its admissibility seems to depend on the circumstances in which it was made.⁷⁴

5.35 We consider that the law would be simplified and improved by the enactment of a rule that statements by deceased persons are admissible in all criminal proceedings, without any qualifications other than those which under our recommendations would apply generally to all statements by unavailable persons. All our consultees agreed that the death of the maker of a statement should render the statement admissible. Any party wishing to take advantage of this exception would have to satisfy the court that it was applicable. We would expect that in practice the fact of death would generally be agreed on the production of a death certificate. Since our recommendations do not cut down any of the existing common law exceptions, dying depositions and declarations could still be taken. If presented as statements under the new law they would be statements contained in documents and would be generally admissible. The fact that a statement was in a dying deposition or declaration might be thought to be a factor adding to its weight, but the jury would also be entitled to consider any evidence as to the credibility of the deceased and the circumstances in which he made the statement and witnessed the events narrated in it. When any statement by a deceased person was admitted under the new law the judge would direct the jury, as he does at present,⁷⁵ as to the assessment of its weight. We **recommend:**

- 5. Subject to the other recommendations in this Part of this Report, statements by deceased persons should be admissible.**

(Draft Bill, clause 1(1)(a))

Illness

5.36 As we have noted, it is thought that permanent insanity is the only medical condition which renders admissible the statement of a person who is too ill to give evidence. Our consultees agreed that this exception should be extended to cover any person who was unfit to give evidence "by reason of his bodily or mental condition". These words, which also appear in section 23(2)(a) of the Criminal Justice Act 1988, are intended to cover infirmity of any kind. The words "mental condition" are not synonymous with "mental disorder" in mental health legislation.⁷⁶ They would apply where a witness was unable to give evidence because of any mental condition.⁷⁷ It would be for the party tendering the statement to satisfy the court that this exception applied, normally by the production of a medical certificate in appropriate terms.⁷⁸

5.37 This exception could apply not only where the infirmity was present at the time the witness would be called to give evidence, but also where he became unfit to testify after he had been sworn. For example, he might be taken ill in the course of his evidence; or a vulnerable witness, such as a child or an adult complainer in a trial for rape or some other

⁷⁴ Lewis, p 327; Renton and Brown, para 7-42.

⁷⁵ *McIlreavy v HMA* 1991 GWD 28-1653; *Higgins v HMA* 1993 SCCR 542. Another recent case where a statement by a deceased person was admitted is *HMA v Tustin and Cushion, The Scotsman*, 13 May 1992 (tape-recorded statement by attempted murder victim to police).

⁷⁶ *Crompton v General Medical Council (No 2)* [1985] 1 WLR 885 at p 895.

⁷⁷ *R v Setz-Dempsey and Richardson* (1994) 98 Cr App R 23 at pp 27-28.

⁷⁸ *McNair v HMA* 1993 SLT 277.

sexual offence, might become too distressed to continue to give evidence. The party seeking to adduce the witness's statement would have to satisfy the court that the witness was now unfit to give evidence, usually, no doubt, by having the witness medically examined and either leading the doctor as a witness or producing a medical certificate. This, we consider, would often be preferable to the abandonment of a trial on a serious charge because the complainer or some other witness whose evidence was material was too distraught to go into the witness box, or to continue to give evidence.

5.38 The condition rendering the person unfit to give evidence, unlike the common law condition of permanent insanity, might be permanent or temporary. In practice, however, where the condition is not permanent and the person is likely to be able to give evidence within a reasonable time, a party might prefer to move for an adjournment of the trial diet rather than for the admission of the statement. A further practical consideration is whether it would be possible for the maker of the statement to give evidence on commission.⁷⁹ We propose that if that is possible, the statement should be inadmissible, on the ground that direct oral evidence, even if given on commission, would be preferable to hearsay. We therefore consider that this exception should apply only where the witness is too ill to give evidence in any competent manner.

5.39 We recommend:

6. **Subject to the other recommendations in this Part of this Report, a statement should be admissible if the person who made it is unfit to give evidence in any competent manner by reason of his bodily or mental condition.**

(Draft Bill, clause 1(1)(a))

Absence abroad

5.40 Under the present law there is no exception to the hearsay rule for a statement made by a person who is furth of Scotland.⁸⁰ The fact that he cannot be required to give evidence is not a ground on which his statement can be admitted as evidence.⁸¹ In the Discussion Paper we asked whether a statement should be admissible if the maker is outside the United Kingdom (or is furth of Scotland) and it is not reasonable and practicable (or not practicable) to secure his attendance, or to secure his evidence by means of a letter of request to a foreign jurisdiction.⁸² This question was derived from the clause which became section 23(2)(b) of the Criminal Justice Act 1988. Section 23(2)(b) provides that a statement made by a person in a document is admissible if the person is outside the United Kingdom and it is not reasonably practicable to secure his attendance. The majority of our consultees agreed that an exception to the hearsay rule should be made where the maker of the statement was outside the United Kingdom and it was not reasonable and practicable to secure his attendance.

⁷⁹ Criminal Justice (Scotland) Act 1980, s 32(1)(a)(i) (ill or infirm witness in UK, Channel Islands or Isle of Man); Prisoners and Criminal Proceedings (Scotland) Act 1993, s 33 (child witness).

⁸⁰ In *McNair v HMA* 1993 SLT 277 at p 278 the Court recorded without adverse comment an erroneous statement by counsel that an exception for the hearsay rule was recognised if a witness had left the country.

⁸¹ *Glyn v Johnston & Co* (1834) 13 S 126.

⁸² DP, paras 3.17, 3.27, prop 3(1)(b).

5.41 There are various arrangements for securing the evidence of a witness who is furth of Scotland, according as the witness is in another part of the United Kingdom or is outside the United Kingdom. If the witness resides in the United Kingdom, the Channel Islands or the Isle of Man his evidence may be taken on commission if he is ill or infirm;⁸³ but if he resides in England, Wales, Northern Ireland, the Channel Islands or the Isle of Man and is neither ill nor infirm it may be difficult, if not impossible, to secure his personal attendance in court. The only statutory arrangements for the attendance of residents in these territories as witnesses in the Scottish criminal courts are inadequate: there are only old provisions for the attendance of witnesses in England or Northern Ireland at jury trials,⁸⁴ and of witnesses in England and Wales at summary trials.⁸⁵ In 1975 the Thomson Committee recommended the establishment of a simple method of citation which would apply throughout the whole of the United Kingdom,⁸⁶ but that recommendation has not yet been implemented. In our view the implementation of that recommendation is long overdue. In the following paragraphs we shall assume that it has been implemented.

5.42 Where a witness is outside the United Kingdom there are various procedures by which attempts may be made to obtain his evidence. A witness who is outside the United Kingdom may be cited where arrangements have been made under section 2(1)(b) of the Criminal Justice (International Co-operation) Act 1990,⁸⁷ but the witness is not bound to comply.⁸⁸ Where a witness resides outside the United Kingdom, Channel Islands and Isle of Man his evidence may be taken on interrogatories following upon the issue of a letter of request.⁸⁹ If a witness is not ordinarily resident in, and is, at the time of the trial diet, unlikely to be present in, the United Kingdom, the Channel Islands or the Isle of Man, his evidence may be taken on commission.⁹⁰ In solemn proceedings the evidence of a witness who is outside the United Kingdom may be obtained through a live television link.⁹¹

5.43 Like the majority of our consultees, we consider that an exception to the hearsay rule should be made for a statement by a person who at the time of the trial is abroad. We propose, however, that certain conditions would have to be met before such a statement was admissible. We propose, first, that the person should be outside⁹² the United Kingdom, the Channel Islands and the Isle of Man. In this respect it seems appropriate for any new provision to be consistent with section 32(1)(a) of the Criminal Justice (Scotland) Act 1980, which in practice is likely to be the most frequently used provision for obtaining the evidence of a person who is overseas.

5.44 The second condition we propose is that the person who made the statement should be identified to the satisfaction of the court. It should not be possible for a party to lead a statement allegedly made by a person about whose identity no information is available. For example, at the trial of X for armed robbery it should not be possible to lead a witness to say

⁸³ Criminal Justice (Scotland) Act 1980, s 32(1)(a)(i): see para 5.38 above.

⁸⁴ Writ of Subpoena Act 1805.

⁸⁵ Summary Jurisdiction (Process) Act 1881, s 4(3).

⁸⁶ *Criminal Procedure in Scotland (Second Report)* (1975), Cmnd 6218, para 14.26.

⁸⁷ Act of Adjournment (Consolidation) 1988, rr 169, 170, inserted by SI 1992 No 1489.

⁸⁸ 1990 Act, s 2(3).

⁸⁹ Criminal Justice (Scotland) Act 1980, s 32(1)(a); Act of Adjournment (Consolidation) 1988, rr 51-56, 101-106.

⁹⁰ *Ibid*, s 32(1)(b)(ii); rr 57-61, 107-111.

⁹¹ Criminal Justice (Scotland) Act 1980, s 32A, inserted by the Prisoners and Criminal Proceedings (Scotland) Act 1993, s 32.

⁹² *ie* not physically present within these territories: see *R v Jiminez-Paez* (1994) 98 Cr App R 239.

that when he was in a bar in a particular foreign city he overheard three men he did not know talking about how they had done the robbery and saying that X had not been there. The party tendering the statement should be required to attribute it to a particular individual with sufficient specification of his identity to enable the judge hearing the application to be satisfied that the individual exists and that the other side have enough information to enable them to make enquiries about him and attack his credibility at the trial if they think it appropriate to do so.

5.45 The third condition we propose is that the party wishing to tender the statement should have made serious efforts to obtain the personal attendance of the person in court or to obtain his evidence by any of the methods mentioned in paragraph 5.42 above. The reason for this condition is that, as with a person who is ill, his own oral evidence, even if given on commission or on interrogatories, is to be preferred to hearsay. There is a question as to the standard by which the efforts of the party to obtain the person's evidence are to be judged. Should the party be required to do what is practicable, or reasonable and practicable, or reasonably practicable? We consider that a test of practicability would be unduly strict. Suppose, for example, that the person's evidence is material but is nevertheless in short compass. It might be literally practicable to obtain his evidence by live television link, but the expense of the procedure would probably be great. A test of reasonable practicability would, we think, require the party to make serious efforts to obtain the person's evidence,⁹³ but would enable the court to take account of all the circumstances of the case,⁹⁴ including such matters as the expense of bringing the witness to court or using any of the alternative procedures,⁹⁵ the seriousness of the case and the importance of the information in the statement. The court should also be entitled to consider whether it would be reasonably practicable to secure the evidence at or for a later trial diet, if that issue is raised by either party.⁹⁶

5.46 As with the other exceptions, the party tendering the statement would have to satisfy the court that the conditions for its admissibility existed: that the maker was outside the United Kingdom, the Channel Islands and the Isle of Man, and that it was not reasonably practicable to obtain his evidence either by securing his attendance at the trial or by any other means.

5.47 We recommend:

7. **Subject to the other recommendations in this Part of this Report, a statement should be admissible if -**
 - (a) **the person who made it is sufficiently identified,**
 - (b) **he is outwith the UK, the Channel Islands and the Isle of Man, and**
 - (c) **it is not reasonably practicable -**
 - (i) **to secure his attendance at the trial or**

⁹³ *R v Gonzales de Arango* (1993) 96 Cr App R 399 at pp 403-404; *R v Matthey*, *R v Queeley*, *The Times*, 13 October 1994.

⁹⁴ *R v Hurst* [1995] 1 Cr App R 82 at pp 91-93; see also *R v Bray* (1989) 88 Cr App R 354 at p 357; *R v Minors* [1989] 1 WLR 441 at p 448.

⁹⁵ *R v Case* [1991] Crim L R 192; *R v Maloney* [1994] Crim L R 525.

⁹⁶ Cf *R v French and Gowhar* (1993) 97 Cr App R 421 where the issue was not raised at the trial.

(ii) to obtain his evidence in any other competent manner.

(Draft Bill, clause 1(1)(b))

Disappearance

5.48 Under the present law a statement is not admissible as evidence of the matter contained in it on the ground that the person who made the statement cannot be found. If the disappearance of the maker of the statement causes a party to lose the opportunity of placing before the court information which would be relevant and helpful to his case, the law regards that as a misfortune which has to be borne:

"If parties are unable to find a witness, that is a misfortune to the litigant, and a misfortune to which he must just submit."⁹⁷

In England and Wales, section 23 of the Criminal Justice Act 1988 provides that a statement made by a person in a document is admissible, subject to judicial discretion, if all reasonable steps have been taken to find him but he cannot be found.⁹⁸ In the Discussion Paper we referred to the corresponding clause in the Bill which preceded the 1988 Act and asked whether a statement should be admissible in exception to the hearsay rule where all reasonable steps had been taken to find the maker of the statement but he could not be found.⁹⁹

5.49 The majority of our consultees did not favour the creation of an exception to the hearsay rule on this ground, considering that such an exception would be open to abuse. One group of consultees who considered the question in detail accepted that it would be proper to resort to hearsay if a witness had disappeared and could not be found, but they were averse to creating an exception that might encourage the admissibility of hearsay where a witness was alive and compellable but had eluded that party's lines of pursuit or inquiry, which might be far from thorough but still qualify in the circumstances as "reasonable". In their view the admission of hearsay on the ground of disappearance should occur only in exceptional circumstances and the test should be formulated so as to secure that result.

5.50 We agree that it should be proper to admit hearsay if a witness has disappeared and cannot be found. His disappearance is an insuperable obstacle to his being called to give evidence in person before the jury at the trial. In accordance with the principle we have formulated, hearsay evidence of a statement by him should be admissible on the ground of necessity, provided that safeguards against abuse are in place.¹⁰⁰ We have already listed,¹⁰¹ and we shall fully consider later,¹⁰² the safeguards which we propose should apply where an application is made to adduce a statement falling within any of our proposed exceptions. In

⁹⁷ *HMA v Monson* (1893) 1 Adam 114, 21 R(J)5, per LJ-C Macdonald at pp 133, 10.

⁹⁸ 1988 Act, s 23(1), (2)(c). R 804(a)(5) of the Federal Rules of Evidence makes certain classes of statement admissible where the maker is absent from the hearing and the party tendering the statement has been unable to procure his attendance "by process or other reasonable means". The classes are: former testimony, statements under belief of impending death, statements against interest, statements of personal or family history and, subject to conditions, any statement having equivalent circumstantial guarantees of trustworthiness.

⁹⁹ DP, paras 3.15, 3.18, 3.27, prop 3(1)(d).

¹⁰⁰ See paras 5.30, 5.31 above.

¹⁰¹ See para 5.32 above.

¹⁰² See paras 5.63-5.64, 6.3-6.26 below.

addition to these general safeguards, we propose others which should apply where it is said that the maker of the statement has disappeared.

5.51 First, the maker of the statement must be sufficiently identified, like the maker of a statement who is abroad.¹⁰³ In our view it should not be possible for either the prosecution or the defence to tender anonymous letters, or to say that they have not been able to take any steps to find the maker of a statement because they do not know who he is. The maker should be an identifiable person whose credibility the other party should have an opportunity to attack. Secondly, the party tendering the statement should be required to satisfy the judge that "all reasonable steps" have been taken to find the maker. This condition requires more than some half-hearted steps, or only a few reasonable steps. We would expect judges to make it clear to parties founding on this exception that they must exert themselves to comply with this condition.

5.52 The reason why the maker of the statement had disappeared would be immaterial, unless his disappearance had been engineered by the party tendering the statement: in that event, the statement would not be admissible.¹⁰⁴ It is the fact of the maker's disappearance, rather than the reason for it, which would determine the admissibility of his statement. Here we differ from section 23(3) of the Criminal Justice Act 1988, which makes special provision for the admissibility, subject to the exercise of judicial discretion, of a statement in a document which has been made to a police officer or some other official investigator by a person who "does not give oral evidence through fear or because he is kept out of the way". In the Discussion Paper we pointed out that we were not putting forward for consideration a provision on these lines because we were of the view that where a person could not be found, for whatever reason, his case would fall within the exception for statements by a person who could not be found after all reasonable steps to find him had been taken.¹⁰⁵ Under our proposals, where a person either came to court but refused to give evidence¹⁰⁶ or did not come to court at all because he could not be found, a statement he had made to the police would be admissible (provided that it was not a precognition).¹⁰⁷ It would not be necessary for the party tendering the statement to prove that he was fearful, or had been kept out of the way. It has been said that by section 23(3)(b) Parliament has "let loose one or two potentially unruly horses which the courts will have to be vigilant to control".¹⁰⁸

5.53 We recommend:

8. **Subject to the other recommendations in this Part of this Report, a statement should be admissible if -**
 - (a) **the person who made it is sufficiently identified,**
 - (b) **all reasonable steps have been taken to find him and**

¹⁰³ See para 5.44 above.

¹⁰⁴ See paras 5.63-5.64 below.

¹⁰⁵ DP, para 3.19.

¹⁰⁶ See paras 5.54-5.62 below.

¹⁰⁷ And provided also that the Crown had not caused him to refuse to give evidence, or to disappear, which would be unlikely.

¹⁰⁸ *R v Acton JJ, ex p McMullen* (1991) 92 Cr App R 98 per Watkins LJ at p 104. See also *Neill v North Antrim Magistrates' Court* (1993) 97 Cr App R 121, [1992] 1 WLR 1220, [1992] 4 All ER 846; *R v Churchill* [1993] Crim L R 285; *R Munday*, "The proof of fear" (1993) 143 NLJ 542, 587.

(c) he cannot be found.

(Draft Bill, clause 1(1)(c))

Refusal to be sworn

5.54 The proposed exceptions to the hearsay rule which we have considered in the foregoing paragraphs are concerned with cases where the maker of a statement is not available to give evidence in person as a witness in court, on commission, by live television link or in any other competent manner. The crucial factor, however, which is common to all our proposed exceptions is that the *evidence* of the person concerned should be unavailable.¹⁰⁹ In the exceptions discussed in the following paragraphs the person is physically present in court¹¹⁰ but in various specified circumstances he does not give evidence on matters about which he has previously made a statement. The specified circumstances, which will be discussed in later paragraphs,¹¹¹ are: (1) that the maker of the statement has been called as a witness and has refused to be sworn; or that, having been sworn, he either (2) has refused to give evidence about any matter in the statement or (3) has successfully claimed the privilege against self-incrimination in relation to any matter in the statement.

5.55 Those three situations are not an exhaustive list of the circumstances in which a person is called as a witness but his evidence on a particular matter is not available to the court. We have already dealt with the case of a person who attends the court as a witness but becomes unable to give evidence, before or after going into the witness box, because he becomes unfit to do so by reason of his bodily or mental condition.¹¹² We shall discuss in Part VII the case of a witness who is unable to give evidence on a particular matter in the witness box but is able to adopt as his evidence a statement about the matter which he made on a previous occasion. Here we are concerned, first, with people who are competent, or qualified, as witnesses but are legally entitled to choose whether or not to testify. They fall into two classes. First, there are those who are not compellable: they may lawfully refuse to give evidence at all. Secondly, there are those who possess a privilege to refuse to answer questions on certain matters: they are not entitled to refuse to give evidence at all, but they may claim a privilege to refuse to answer particular questions. In criminal cases the principal rules as to compellability are concerned with the accused and his spouse¹¹³ and with communications between spouses.¹¹⁴ The privileges recognised by the law of Scotland are those against self-incrimination and those founded on confidentiality, of which the most important are those attaching to communications relative to litigation.¹¹⁵ Information may also be withheld from the court by a witness on the ground of public policy, the ground now generally referred to in England as "public interest immunity".¹¹⁶ Apart from those categories of people who are lawfully entitled to decline to give evidence, there are those who unlawfully refuse to give evidence. A person who is both competent and compellable as a witness may refuse to be sworn as a witness at all or, having been sworn, he may refuse to

¹⁰⁹ See para 5.30 above.

¹¹⁰ Or before the commissioner, or in order to take part in a live television link or any other competent procedure: in the following paragraphs "court" includes all these procedures.

¹¹¹ See paras 5.57-5.62 below.

¹¹² See paras 5.36-5.39 above.

¹¹³ See 10 *Stair Memorial Encyclopaedia* paras 540-543.

¹¹⁴ *Ibid*, paras 677, 679.

¹¹⁵ *Ibid*, paras 670-676, 681-684.

¹¹⁶ *Ibid*, paras 687-689.

give evidence, either by refusing to answer any questions whatever or by refusing to answer questions on a particular subject.

5.56 In every case where a person comes to court but declines to give evidence, whether lawfully or unlawfully, his evidence is not available to the court. We do not think, however, that it would be appropriate for us to recommend in this Report that whenever a person declines to give evidence on a relevant matter about which he has previously made a statement, evidence of his statement should be admissible by way of a new exception to the hearsay rule. Any such proposal would require careful consideration and wide consultation as to its effect on the interests protected by the present rules as to compellability and privilege, and as to the potential value of such a sweeping exception in practice. We intend to limit our recommendations to the three sets of circumstances mentioned above.¹¹⁷ In each of these cases, we believe, the need for a new exception to the hearsay rule is clear. We now consider each case separately.

5.57 The first case is that of a person who is compellable to give evidence and attends the court but refuses to be sworn or to affirm.¹¹⁸ Refusal to take the oath or to affirm is contempt of court.¹¹⁹ Its effect is to deprive the court of the witness's evidence. It appears to us that in that situation there are strong reasons why evidence should be led of any statement made by him which is relevant to any matter in issue at the trial. Not only would evidence of the statement be better than no evidence at all: the fact that the witness refused to give evidence might well be among the circumstances indicating that the contents of the statement are likely to be true. The general safeguards we propose would apply: in particular, the statement could not be a statement in a precognition (other than a precognition on oath), and it would not be admissible if the person tendering it had caused the witness to refuse to give evidence.¹²⁰

Refusal to give evidence

5.58 Similar considerations apply to the second case, where a person is sworn as a witness but unlawfully refuses to give evidence, either by refusing to answer any questions whatever, or to answer a particular question or questions. If any question put to a witness is competent and relevant and the court has not exercised its residual discretion to excuse him from answering it,¹²¹ his refusal to answer constitutes contempt of court.¹²² We propose that if a witness has made a statement dealing with the subject-matter of the question or questions he has refused to answer, the statement should be admissible only if the witness has refused to answer the question or questions after being directed to do so by the trial judge. A distinct order by the judge would make the fact of refusal entirely clear. It would not be satisfactory to rely on a party's assertion that the witness had stated that he would refuse to answer

¹¹⁷ See para 5.54 above.

¹¹⁸ Or, if a child, to answer the questions put by the judge in order to satisfy himself that the child is a competent witness prior to admonishing him.

¹¹⁹ See G H Gordon, *The Criminal Law of Scotland* (2nd edn, 1978), para 51-04.

¹²⁰ The CLRC recommended that hearsay should be admissible when the maker of the statement refuses to be sworn: CLRC, paras 236, 249.

¹²¹ The discretion would be exercised only in "quite exceptional circumstances": *HMA v Aird* 1975 JC 64 at p 70.

¹²² See Gordon, above.

questions, or on some judicial pressure on the witness to answer, short of an order, such as advice that it was his duty to answer.¹²³

Privilege against self-incrimination

5.59 The third case is that of a person who has been sworn as a witness but, on being questioned as to a particular matter, claims the privilege against self-incrimination. This privilege entitles a witness to refuse to answer a question if a true answer will render him or her liable to prosecution and conviction for a crime or will involve an admission of adultery, which used to be regarded and punished as a crime.¹²⁴ It is for the witness to decide whether to claim or to waive the privilege. If he claims it, it is for the judge to decide whether he is obliged to answer the question. If the judge rules that he is not obliged to answer, the effect of his ruling is that the witness's evidence on the matter is not available to the court. It is in that situation that we propose that a statement by the witness dealing with the subject-matter of the question or questions he has refused to answer should be admissible.

5.60 In the United States rule 804(a)(1) of the Federal Rules of Evidence provide that certain types of statement¹²⁵ are not excluded by the hearsay rule if the maker of the statement "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of [his] statement". This rule resembles our proposal insofar as a claim of privilege must be made by the witness and upheld by the court, but differs from it insofar as it applies to a claim of any class of privilege. The rule is said to be most commonly invoked by claims of the spousal privilege or the privilege against self-incrimination.¹²⁶ As we have explained, we do not deal in this Report with the corresponding Scottish rules as to the privilege or compellability of spouses.¹²⁷

5.61 We consider that if a criminal has made a statement disclosing that he has committed a crime, evidence of the statement should not be excluded, if relevant, at a trial in which he claims the privilege against self-incrimination in relation to the subject-matter of the statement. If he has already disclosed the information in the statement to someone, it should not be withheld from the court. It should not be acceptable for a criminal to disclose his criminal activity to a person outside the court and then to claim the privilege in order to prevent the disclosure of his crime to a court which requires information relevant to the guilt or innocence of an accused person. That view underlies rule 231 of the American Model Code, whereby a previous voluntary disclosure of privileged matter destroys the privilege. In his foreword to the Code Professor Edmund M Morgan commented:

¹²³ In the Law Reform Commission of Canada's Evidence Code, a statement is admissible if the maker "persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so": *Report on Evidence* (1977), cl 29(2)(c). Under rule 804(a)(2) of the Federal Rules of Evidence certain classes of statement are admissible if the maker "persists in refusing to testify concerning the subject matter of [his] statement despite an order of the court to do so". For the classes see footnote to para 5.48 above.

¹²⁴ It has been submitted that the privilege as to adultery should be abolished: Macphail, para 18.18. The corresponding English provision was abolished by s 16(5) of the Civil Evidence Act 1968.

¹²⁵ See footnote to para 5.48 above.

¹²⁶ *Weinstein's Evidence* (1994), vol 4, p 804-46.

¹²⁷ See para 5.56 above.

"A party should not be permitted to use his privilege ... solely for the purpose of preventing disclosure in an official investigation. If he discloses it to others, he should be required to disclose it in court."¹²⁸

We would not go so far as to require the witness to disclose the privileged matter himself, but we see no objection to the leading of evidence of a statement he has already made about the matter to another person or persons.

5.62 We **recommend**:

9. **Subject to the other recommendations in this Part of this Report, a statement should be admissible if the person who made it is called as a witness and -**
- (a) **refuses to take the oath or affirmation or, if a child, to accept an admonition to tell the truth; or**
 - (b) **having been sworn or admonished and directed by the judge to give evidence in connection with the subject-matter of the statement, refuses to do so; or**
 - (c) **having been sworn or admonished, is allowed by the judge to refuse to give such evidence on the ground that it might incriminate him.**

(Draft Bill, clause 1(1)(d), (e), (10))

Unavailability caused by the party tendering the statement

5.63 We propose as a safeguard against the abuse of the exceptions that a statement should not be admissible if the party tendering it has brought about the conditions required by the exception founded on in order to prevent the evidence from being available. If, for example, the accused or anyone acting on his behalf has caused a potential witness to disappear, or to refuse to give evidence, the accused should not be entitled to lead evidence of the potential witness's statement. Such a safeguard is provided in the Federal Rules of Evidence and in the Law Reform Commission of Canada's Evidence Code. In the Federal Rules, the definition of "unavailability" includes the following provision:

"A declarant is not unavailable as a witness if exemption [from testifying, on the ground of privilege], refusal [to testify], claim of lack of memory, inability [because of death, illness or infirmity] or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."¹²⁹

In the Evidence Code, section 29 makes an exception to the hearsay rule for a statement of a person unavailable as a witness, but provides:

¹²⁸ American Law Institute, *Model Code of Evidence* (1942), p 31.

¹²⁹ Rule 804(a).

"(3) A statement is not admissible under this section 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."¹³⁰

5.64 We consider that a similar safeguard should be included in any new provision for exceptions to the hearsay rule in Scotland. We **recommend**:

10. None of the statements specified in recommendations 5 to 9 above should be admissible if the circumstances mentioned in the relevant recommendation have been brought about by or on behalf of the party tendering the statement for the purpose of preventing the maker of the statement from giving evidence.

(Draft Bill, clause 1(4))

Confessions by third parties

5.65 The exceptions to the hearsay rule which we have recommended could have the effect of moderating the rigour of an important rule which has been the subject of recent authoritative decisions. The rule is that an accused person cannot lead evidence of a statement by a person he has incriminated which is to the effect that that person committed the crime of which the accused has been charged.

5.66 The rule was stated in *Perrie v HM Advocate*¹³¹ and affirmed by the majority of the Court in *McLay v HM Advocate*.¹³² The law of England appears to be the same: in *R v Blastland*¹³³ the House of Lords refused leave to appeal on the first of the certified points of law, which was whether a confession by a person other than the defendant to the offence of which the defendant is charged is admissible in evidence where that person is not called as a witness. The House of Lords affirmed that the accused is not allowed to prove a confession made by X that X, and not the accused, committed the crime for which the accused is on trial. In *Perrie* the Court adopted the view expressed by Lord Bridge of Harwich in *Blastland*¹³⁴ that to admit such statements by third parties not called as witnesses "would be to create a very significant and, many might think, a dangerous new exception". The apprehended danger, which we accept is a very real danger, is that in many cases accomplices of the accused would seek to exculpate him by giving concocted evidence of false, or non-existent confessions by third parties. It is clear that false evidence of that kind might be sufficient, if not to convince a jury, at least to raise what they would regard as a reasonable doubt in their minds as to the guilt of the accused. On the other hand it has been observed that cases such as *Blastland* show that the hearsay rule can operate to the detriment of the accused.¹³⁵ It seems undeniable that there would be a miscarriage of justice if an innocent person were to be convicted because he had not been entitled to adduce credible and reliable evidence that a third party had truthfully confessed to the crime.

¹³⁰ Law Reform Commission of Canada, *Report on Evidence* (1977).

¹³¹ 1992 SLT 651, 1991 SCCR 255.

¹³² 1994 SLT 873, 1994 SCCR 397; followed, *Irvine v HMA* 1994 GWD 28-1672, *Kerr v HMA* 1994 GWD 28-1673.

¹³³ [1986] AC 41.

¹³⁴ Above, at pp 52-53.

¹³⁵ *R v Kearley* [1992] 2 AC 228 *per* Lord Browne-Wilkinson at p 287.

5.67 Under the present law an accused who wishes to prove that a third party has confessed to the crime may do so only by calling the third party as a witness and hoping that he will repeat the confession in the witness box.¹³⁶ That will generally be a forlorn hope.¹³⁷ Let us assume, however, that the confessor can be found and attends the court in obedience to his citation. If he refuses to be sworn, or takes the oath but refuses to answer a question about the confession, either by invoking the privilege against self-incrimination or for no lawful reason,¹³⁸ the defence are not entitled to prove the statement. If he takes the oath and withdraws the confession, the defence may put it to him as a previous inconsistent statement and prove the making of it through another witness or witnesses.¹³⁹ In that event, however, evidence of the statement is admissible only for the purpose of indicating that the confessor's testimony in court is unreliable, not for the purpose of proving the truth of its contents. It is possible that that distinction might not be understood by the jury. In any event they might consider that the evidence of the statement raised a reasonable doubt as to the guilt of the accused. Where the confession was truthful, that would be a circuitous way of gaining a meritorious acquittal.

5.68 If our recommendations were implemented, the position would be somewhat more satisfactory. Our recommendations do not apply to a confessor who is a co-accused, since we exclude from consideration in this Report statements made by persons accused in the trial.¹⁴⁰ If, however, the confessor was dead, ill or abroad, or had disappeared, evidence of the confession would be admissible provided that the relevant conditions attached to our recommendations were met. If the confessor was called as a witness, evidence of the confession would be admissible where he refused to take the oath, or refused to answer questions about the confession, either unlawfully or by claiming the privilege against self-incrimination. If he gave evidence inconsistent with the confession, it could be put to him as a previous inconsistent statement, as it could be under the present law.

5.69 We consider that under our scheme the prospect of a miscarriage of justice would be less likely than under the present law, which entirely forbids hearsay evidence of a third party's confession. Our scheme makes no special provision for such evidence: its admissibility would depend on its compliance with the conditions prescribed by the scheme for the relevant exception to the hearsay rule. Like the present law, our scheme expresses a clear preference for the direct oral evidence of the confessor in court. Unlike the present law, it admits hearsay evidence; but it does so only if the court is satisfied that the obstacles to leading the confessor's direct oral evidence are such that it cannot realistically be obtained. The first resort of the party desiring to rely on the confession must be to call the confessor. He will be entitled to prove the confession by hearsay evidence only in either of two situations. In the first, he has called the confessor into the witness-box and has been met with a refusal by the confessor to give evidence. Here the party will be able to rely on one of the exceptions in recommendation 9 above.¹⁴¹ In the second, the party has not called the

¹³⁶ Provided that he is not a co-accused. An accused, A, may be called as a witness on behalf of a co-accused, B, only with A's consent, which would probably be withheld if A was to be asked to repeat or confirm a confession. In any event evidence of A's confession is not admissible for the purpose of assisting B: *McLay*, above, *per* LJ-C Ross at pp 879, 411, Lord Penrose at pp 887, 423.

¹³⁷ Unless the witness has voluntarily made a false confession to the crime, as sometimes happens when a sensational crime is widely reported; but the falsity of such a confession would often be easy to demonstrate.

¹³⁸ Where, for example, he cannot invoke the privilege because he has already been acquitted of the crime.

¹³⁹ Criminal Procedure (Scotland) Act 1975, ss 147, 349.

¹⁴⁰ See paras 5.71-5.77 below.

¹⁴¹ See para 5.62 above.

confessor and has convinced the court that he cannot do so by establishing that one of the other exceptions applies.

Statements for which no provision is made

5.70 The categories of statements which we recommend should be admissible do not exhaust the situations in which statements relevant to an issue at the trial may have been made by persons whose evidence is not available to the court, but the statements are inadmissible under the present law.

Statements by accused persons

5.71 Our recommendations do not affect the present law as to statements by the accused which have been made extrajudicially, that is, other than while testifying in the proceedings. In the Discussion Paper we sought views on three propositions concerning such statements, which were there referred to as the "prior statements" of accused persons. We have decided, however, not to make any recommendations on the matters referred to in these propositions.

5.72 The first proposition was that an accused's prior statement, other than a precognition, which had not been improperly obtained should be admissible as evidence of fact in so far as it affected that accused, whether in whole or in part it incriminated or exculpated him, and whether or not he gave testimony at his trial.¹⁴² After the Discussion Paper was published the law on this topic was the subject of authoritative and comprehensive restatement by a Bench of seven judges in *Morrison v HM Advocate*.¹⁴³ The rules laid down in *Morrison* apply to statements made by an accused person which are not solely incriminating, which have been made after the commission of the offence and prior to his trial,¹⁴⁴ and which have been accurately recorded and fairly obtained. The rules are as follows:

- (1) An accused is not entitled to lead in evidence a prior statement which is to any extent exculpatory as evidence of the truth of its contents, unless the statement is truly part of the *res gestae*.¹⁴⁵
- (2) Where evidence is led by the Crown, or by the defence without objection by the Crown, of an accused's prior statement which is mixed, that is, capable of being both incriminatory and exculpatory, the whole statement is admissible as evidence of the facts contained in it. The jury should be directed to consider the whole statement and determine whether they accept the whole or any part of it as the truth. The judge may well feel it desirable to comment on the weight which the jury may wish to place upon different parts of it, and it will normally be appropriate for him to remind them that it was not made on oath and was not subject to cross-examination, leaving it to them to

¹⁴² DP, para 4.25, prop 12.

¹⁴³ 1990 JC 299, 1991 SLT 57, 1990 SCCR 235.

¹⁴⁴ The Court stressed that they were not concerned with statements made in the course of judicial examination, but there appears to be no valid distinction in principle between such statements and those considered by the Court.

¹⁴⁵ We have suggested elsewhere that "*res gestae*" refers to those matters which are so closely linked to the alleged offence, in terms of place, time and circumstances, as to form part of a single event: *Report on Evidence in Cases of Rape and Other Sexual Offences* (1983) Scot Law Com No 78, para 3.7. See 10 *Stair Memorial Encyclopaedia* para 710.

determine what weight should be attached to it in such circumstances. Where the accused has elected not to give evidence, any comment by the judge in relation to the exculpatory remarks upon the accused's failure to testify should be made with restraint and only where there are special circumstances which require it.

- (3) An accused's prior statement which is not to any extent incriminatory is admissible for the limited purpose of proving that the statement was made and the attitude and reaction of the accused at the time it was made, but it is not evidence of the facts contained in it. It may be admitted to show that his story has been consistent and to rebut any challenge to his credibility. Thus, he may for that purpose found on a wholly exculpatory reply to caution and charge.

5.73 *Morrison* has been applied and considered in a number of decisions on this branch of the law.¹⁴⁶ We consider that it is unnecessary for us to make any recommendations.

5.74 Secondly, the Discussion Paper sought views on the law as to the extent to which the prior statement of an accused person should be admissible as evidence in respect of a co-accused. It put forward three options, one of which was to retain the present law on this subject.¹⁴⁷ Under the present law, a statement by one accused is not admissible for the purpose of assisting his co-accused.¹⁴⁸ There is also a general rule that a statement made by one co-accused which is incriminatory of another is not evidence against the latter.¹⁴⁹ The general rule is subject to two exceptions. First, where concert is proved between two or more co-accused, anything said or written by one of them in connection with their common purpose is admissible in evidence against all of them.¹⁵⁰ Secondly, where one accused makes a statement incriminatory of another in the latter's presence, the latter's reaction or silence when the statement is made may be founded on by the Crown as an implied admission of its truth.¹⁵¹

5.75 The majority of those who submitted comments favoured the option that the present law should be retained. We share their views. We are satisfied that the rules proposed in the other two options would not be appropriate. One of these options was that the statement should be evidence as regards a co-accused provided that the maker of the statement gave evidence at the trial and was examined regarding the statement: thus the evidential value of the statement would depend on whether the maker gave evidence. The remaining option was that where an accused, A, the maker of the statement, did not give evidence, the statement should be admissible as evidence of fact for or against his co-accused, B. That option was subject to the proviso that if B was unable to make use of section 141 or 346 of

¹⁴⁶ *Jones v HMA* 1992 SLT 115; 1991 SCCR 290; *Collins v HMA* 1993 SLT 101, 1991 SCCR 898; *Khan v HMA* 1993 SLT 172, 1992 SCCR 146; *Howarth v HMA* 1992 SCCR 364; *Scaife v HMA* 1992 SCCR 845; *Higgins v HMA* 1993 SCCR 542; *Smith v HMA* 1994 SLT 1161, 1994 SCCR 72; *MacLeod v HMA* 1994 SCCR 528.

¹⁴⁷ DP, para 4.36, prop 13.

¹⁴⁸ *McLay v HMA* 1994 SLT 873, 1994 SCCR 397 per LJ-C Ross at pp 879, 411, Lord Penrose at pp 887, 423.

¹⁴⁹ *Milroy* (1839) Baron Hume, *Commentaries on the Law of Scotland Respecting Crimes* (4th edn with supplement by B R Bell, 1844), II, Bell's Notes 291; *HMA v Kemp* (1891) 3 White 17; *HMA v Monson* (1893) 1 Adam 114, 21 R (J) 5 at pp 132, 9; *Stark and Smith v HMA* 1938 JC 170, 1938 SLT 516 at pp 174, 518; *Jones v HMA* 1981 SCCR 192; *McNicol v HMA* 1993 SCCR 242; Dickson, para 363.

¹⁵⁰ *HMA v Camerons* 1911 SC (J) 110, 1911 2 SLT 108; *Tobin v HMA* 1934 JC 60, 1934 SLT 325; *HMA v Docherty* 1980 SLT (Notes) 33; Dickson, para 363.

¹⁵¹ This exception is considered in para 5.76 below.

the Criminal Procedure (Scotland) Act 1975 to examine or cross-examine A regarding the statement, B should have a right to examine A in respect of the statement, but only in so far as it was adverse to B's interests.¹⁵² Very few consultees were attracted by these options.

5.76 The third proposition was concerned with the admissibility of statements by one accused which incriminated another and had been made in his presence.¹⁵³ It was proposed that such a statement should not be evidence against the other accused solely because at that time he had not denied or refuted what had been said against him.¹⁵⁴ While the majority of those who submitted comments agreed with this proposition, we are persuaded by the arguments of the minority that the present law is satisfactory. The statement is not evidence against the accused except in so far as he, by his reaction to it, has impliedly admitted that it is true. It is his reaction to the statement which supplies the evidence against him.¹⁵⁵ There is no absolute rule that silence necessarily amounts to an implied admission. While evidence of a failure to deny or refute may often be relevant and significant, each case must be considered on its own facts,¹⁵⁶ and the jury are directed that it is for them to decide what inference, if any, should be drawn from the silence of the accused in the whole circumstances.¹⁵⁷ That appears to us to be fair and easy to understand. We therefore do not recommend any change in the law.

5.77 We accordingly **recommend**:

- 11. The recommendations in this Report should not apply to a statement made by a person who is an accused in the trial at the time when evidence of the statement is tendered.**

(Draft Bill, clause 3(6))

Other statements

5.78 For reasons already explained,¹⁵⁸ we do not discuss in this Report statements by persons who are not compellable witnesses or who are entitled to claim a privilege, other than the privilege against self-incrimination. Nor do we propose that statements made by persons who are unidentifiable should be admissible. While it is possible that a relevant statement might be made by an unidentifiable person,¹⁵⁹ we consider that that possibility is outweighed by the likelihood that in many cases such an exception would be open to abuse.¹⁶⁰

5.79 No exception from the hearsay rule is proposed for a statement made by a person who is physically present within the United Kingdom, the Channel Islands or the Isle of Man. We consider that new procedures should be devised for securing the attendance of

¹⁵² DP, paras 4.26-4.36, prop 13.

¹⁵³ See para 5.74 above.

¹⁵⁴ DP, para 4.40, prop 14.

¹⁵⁵ *Kay v Allan* (1978) SCCR Supp 188 at p 191.

¹⁵⁶ See eg *Kay, supra*; *McDonald v Smith* (1978) SCCR Supp 219.

¹⁵⁷ *Lewis v Blair* (1858) 3 Irv 16 per Lord Cowan at p 24, Lord Ardmillan at p 28.

¹⁵⁸ See para 5.56 above.

¹⁵⁹ See *R v Gibson* (1887) 18 QBD 537, discussed in *Teper v R* [1952] AC 480 at pp 487-488.

¹⁶⁰ See paras 5.44, 5.51. A statement by an unidentifiable person might be admissible as part of the *res gestae*: see 10 *Stair Memorial Encyclopaedia* para 710.

such a person,¹⁶¹ and that any inconvenience to the person is justified by the preference for direct oral evidence over hearsay evidence.¹⁶² Nor do we recommend any provision for the admission of a statement by a person who has been cited and has failed to appear in court. An adjournment to secure his attendance to give oral evidence is, we think, preferable to the admission of hearsay. His statement would be admissible only if one of the proposed exceptions applied: if, for example, he could not be found after all reasonable steps had been taken, or if he was brought to court and he refused to give evidence.

5.80 A statement which fell within one of the recommended exceptions would be inadmissible if it was a statement in a precognition, in view of the unreliability of such statements.¹⁶³ Nor would a statement be admissible if it could not be proved by either of the recommended means: by the production of a document in which it was contained, or by first-hand oral hearsay. The exclusion of more remote hearsay is, we think, justified by the risk of the introduction of unreliable or manufactured evidence.¹⁶⁴

¹⁶¹ See para 5.41 above.

¹⁶² See para 4.47 above.

¹⁶³ See para 5.4 above.

¹⁶⁴ See paras 5.21-5.23 above.

Part VI The new exceptions in practice

Introduction

6.1 In this Part we explain the rules of practice and procedure which we propose should apply when a party seeks to take advantage of any of the exceptions to the hearsay rule which we have recommended in Part V. We also test our recommendations in Part V and in this Part against the requirements of the European Convention on Human Rights.

Procedure

6.2 We deal, first, with the procedure for an application to admit a statement as evidence and the proof of the conditions of admissibility; next, with the extent to which it should be possible to attack the credibility and reliability of the maker of the statement, and the circumstances in which additional evidence may be led; and finally with the direction of the jury by the trial judge.

Application to admit statement

6.3 We consider that where a party wishes to adduce evidence of a statement by virtue of one of the recommended exceptions to the hearsay rule, he should be required to apply to the court for leave to do so.¹ Where the ground of the application is that the maker of the statement is physically unavailable to give evidence in person - that is, where the maker is dead, ill or abroad, or cannot be found - we think that the application should be made before the trial diet, wherever that is possible. If the unavailability of the maker was disputed, it would generally be impracticable for a jury trial to be adjourned while the matter was investigated. It might be possible for a summary trial to be adjourned for that purpose, but adjournments of trials in which evidence has been led are usually inconvenient. It is also desirable that, wherever possible, any intention to rely upon one of the recommended exceptions should be communicated to the other side in sufficient time for them to consider whether there are any lawful objections to that course.² The other side should have an opportunity to make inquiries, before the application is determined, as to the maker of the statement and whether the alleged obstacle to obtaining his evidence really exists. If the statement is held to be admissible, the other side should be able to make inquiries before the trial as to the credibility and reliability of the maker of the statement and the truth of the contents of the statement. A strict control of the application procedure by the court might have the effect that in practice parties would be discouraged from relying on one of the recommended exceptions to the hearsay rule unless it was necessary to do so.

6.4 At the time of writing this Report (December 1994) the Criminal Procedure (Scotland) Act 1975 provides for pre-trial diets both in solemn proceedings ("preliminary

¹ The following discussion assumes that the matters contained in the statement cannot be formally admitted or agreed by minute in terms of the Criminal Procedure (Scotland) Act 1975, s 150 (solemn procedure) or s 354 (summary procedure); see Renton and Brown, para 18-05.

² The following discussion also assumes, for the sake of simplicity, a case in which there is only one accused. Where there is more than one accused, all the other parties would be entitled to object.

diets")³ and in summary proceedings ("intermediate diets").⁴ Further provision for pre-trial diets is made in the Criminal Justice (Scotland) Bill which is before Parliament at the time of writing. The Bill amends the 1975 Act in many respects. Clause 12 of the Bill⁵ creates a new mandatory "first diet" in solemn proceedings in the sheriff court. This "first diet" replaces the present preliminary diet in the sheriff court. Clause 12 also amends section 76 of the 1975 Act by extending the scope of any "preliminary diet" held in relation to a trial in the High Court. Clause 13 amends section 337A of the 1975 Act by making the existing "intermediate diet" procedure in summary proceedings mandatory and, amongst other things, extending the purposes for which such diets are held. Accordingly, if the amendments made by the Bill are brought into force there will be three kinds of pre-trial diet: a "preliminary diet" prior to a High Court trial, a "first diet" prior to a sheriff and jury trial and an "intermediate diet" prior to a summary trial. In the following paragraphs we shall assume the coming into force of these amendments.

6.5 In the provisions as to preliminary diets and first diets a party is entitled to give notice of various matters to the court and the other parties. Where he gives notice that he intends to raise certain matters before a High Court trial, the Court is required to order a preliminary diet.⁶ In the sheriff court, a first diet will be mandatory before a sheriff and a jury trial. There is no provision for the giving of notice before an intermediate diet in summary proceedings. We propose that an application to admit a statement on the ground that the maker is physically unavailable⁷ should generally⁸ be determined at the preliminary, first or intermediate diet. In solemn proceedings the party tendering the statement would have to give notice of the application before the preliminary or first diet. In High Court cases the Court would be required to order a preliminary diet. In sheriff and jury cases a first diet will invariably take place.

6.6 The form of the notice and other procedural details would be regulated by Act of Adjournal.⁹ The draft Bill annexed to this Report makes no provision for this since the High Court has sufficient powers to regulate procedure by Act of Adjournal.¹⁰ We envisage that the notice might be required to specify such matters as:

- (a) the date, time and place at which the statement was made;
- (b) the names and addresses, so far as they are known, of the person by whom and the person to whom the statement was made, or any other information sufficiently identifying them;
- (c) an explanation of the grounds upon which the applicant relies for not obtaining the evidence of the maker of the statement;

³ Criminal Procedure (Scotland) Act 1975, s 76 (substituted by the Criminal Justice (Scotland) Act 1980, Sched 4, and amended).

⁴ *Ibid*, s 337A (inserted by the Criminal Justice (Scotland) Act 1980, s 15).

⁵ We refer to the print of the Bill dated 17 November 1994.

⁶ 1975 Act, s 76(1)(a).

⁷ See para 6.3 above.

⁸ See para 6.8 below.

⁹ See recommendation 13 in para 6.9 below. For the present rules as to preliminary diets see Act of Adjournal (Consolidation) 1988, rr 24-40.

¹⁰ Criminal Procedure (Scotland) Act 1975, ss 282, 457.

- (d) a statement that these grounds were not brought about by the applicant or anyone on his behalf for the purpose of securing that the evidence of the maker of the statement cannot be obtained;
- (e) a statement that the maker would have been a competent witness at the time the statement was made;
- (f) the complete terms of the statement; and
- (g) complete details of the evidence by which it is proposed to prove the statement.

6.7 A pre-trial application procedure involves a departure from the traditional position that neither the Crown nor the defence are obliged to reveal their evidence before the trial. There are rules as to the provision of lists of witnesses and productions in solemn proceedings¹¹ and practices as to the informal exchange of lists of witnesses in summary proceedings,¹² but there is no requirement on either side, and in particular on the defence, to disclose to the other what they expect their witnesses to say. We consider, however, that a requirement of disclosure by the defence is justified in the interests of fairness and orderly procedure and is compensated by the advantage to the accused that the new exceptions to the hearsay rule will enable him to lead evidence consistent with his innocence which is excluded by the present law. A disclosure by the defence of an intention to lead hearsay evidence should not be regarded as an undertaking to do so. If the application is granted but the defence subsequently decide not to lead the evidence at the trial, no comment should be made to the jury. We do not think it necessary to make a recommendation to that effect.

6.8 There are two categories of cases in which it will not be possible to determine an application at a pre-trial diet. The first consists of those cases in which a person is called as a witness but refuses to give evidence at the trial, either lawfully when his claim to the privilege against self-incrimination is upheld, or unlawfully, by refusing to be sworn or by refusing to answer a question after being directed by the judge to do so. In these cases there will be no alternative to the making of an application at the trial diet. The second category of cases consists of those in which the unavailability of the maker of the statement is not known to the party tendering it until after the expiry of the time for giving notice prior to a preliminary or first diet, or after the intermediate diet. There will inevitably be cases where a potential witness whom a party intends to call dies, falls ill, goes abroad or disappears during the interval between that time and the trial diet, or even while giving evidence.¹³ Here again, there will be no alternative to an application at the trial diet.¹⁴ Where, however, a case falls into the second category we consider that the applicant should be required to satisfy the court that there was good reason for not making the application at the pre-trial diet. Evidence of a statement should not be admissible simply because the applicant has not checked the availability of his potential witnesses before the pre-trial diet.

¹¹ Criminal Procedure (Scotland) Act 1975, ss 78-82A.

¹² Macphail, para 24.56.

¹³ See para 5.37 above.

¹⁴ It should be noted, however, that an application for the issue of a letter of request must be made before the oath is administered to the jury in solemn proceedings or before the first witness is sworn in summary proceedings. An application may be made thereafter for a commission to take the evidence of a witness who is ill, infirm or abroad, but only if the circumstances on which the application is based have not previously arisen, or would not previously have merited such an application: Criminal Justice (Scotland) Act 1980, s 32(5).

6.9 We recommend:

12. (1) A party who wishes to adduce evidence of a statement by virtue of any of recommendations 5 to 8 above should be entitled to apply for the admission of the statement -
 - (a) in a High Court trial, by giving notice to the Court and the other parties, which should be treated as notice of a matter in respect of which the Court is required to order a preliminary diet;
 - (b) in a sheriff and jury trial, by giving notice to the court and the other parties before the first diet;
 - (c) in summary proceedings, at the intermediate diet.
- (2) Where a party wishes to adduce evidence of a statement by virtue of recommendation 9 above, or where the court is satisfied that there has been good reason for a party not complying with paragraph (1) above, the party should be entitled to apply for the admission of the statement at the trial diet.

(Draft Bill, clause 1(8), (9))

13. The notices referred to in recommendation 12(1) and ancillary procedures should be such as may be prescribed by Act of Adjournal.

Proof of conditions of admissibility

6.10 At the hearing of the application it will be for the party tendering the statement to establish that it is admissible, if that is not conceded by the other side. Thus, in the absence of formal admission the party tendering the statement will have to prove, first, the unavailability of the maker's evidence as a fact. The fact that a witness's claim to privilege has been upheld or that he has refused to be sworn or to answer questions will be self-evident. Death should normally be established beyond argument by the production of a death certificate, and unfitness by reason of a bodily or mental condition by the production of a medical certificate in appropriate terms. The conditions that a maker of a statement is abroad and that it is not reasonably practicable either to secure his attendance at the trial or to obtain his evidence in any other competent manner may be difficult to establish, if disputed, as may the conditions that a maker of a statement cannot be found and all reasonable steps have been taken to find him. There may also be dispute as to whether the unavailability of the evidence of the maker of the statement has been procured by or on behalf of the party tendering the statement. It is possible that evidence might have to be led at the pre-trial diet or an adjourned pre-trial diet¹⁵ or, in the event of an application at the trial diet, at a trial-within-a-trial. The nature of any evidence required to establish any disputed matters will depend on the circumstances of the case. The opponent of the party

¹⁵ Criminal Procedure (Scotland) Act 1975, ss 75A(9) (adjournment of first diet), 76(6D) (adjournment of preliminary diet), 337A(1D) (adjournment of intermediate diet), all inserted by the Criminal Justice (Scotland) Bill, cll 12(2), 12(3), 13(3).

tendering the statement will be entitled to challenge any evidence led by that party and to lead evidence in contradiction of it. It is to be expected that unconvincing evidence on these issues will not be believed by the judge, and that an application supported by such evidence will be refused.

6.11 The party tendering the statement will have to satisfy the court not only that the evidence of the maker is unavailable for the reason on which he founds, but also that the other statutory conditions are satisfied. He will have to show that direct oral evidence of the matters in the statement, if given by the maker at the trial, would be admissible. Thus, for example, the court must be satisfied that such evidence would be relevant. The applicant will also have to establish that the maker of the statement would have been a competent witness at the time when it was made.¹⁶ He must also show that the statement, if adduced at the trial,¹⁷ will be proved at the trial either by the production of a document in which it is contained or by the oral evidence of a witness who personally heard or otherwise perceived the statement being made.¹⁸ If the production of a document is proposed, it will be necessary for the party tendering the document to satisfy the court that the statement is "contained in a document" in one of the ways specified in the legislation¹⁹ and that at the trial a witness or witnesses will be led who will identify the document and explain its nature and provenance.

Testing the credibility and reliability of the maker of the statement

6.12 We have already mentioned²⁰ that if the application to admit the statement is granted, the party against whom the statement is tendered should be able, wherever possible, to make inquiries before the trial as to the credibility and reliability of the maker of the statement and the truth of the contents of the statement. A witness is credible if he is honestly doing his best to tell the truth as he remembers it, and is reliable if his evidence is accurate. At the trial, the opponent of the party tendering the statement may be able to show that the information in the statement is inaccurate or to cast doubt on its accuracy, for example by leading strong evidence which contradicts it, or which casts doubt on the maker's opportunity to know the matters related in the statement. For example, evidence might be led to show that anyone in the position which the maker of the statement must have occupied would not have had a sufficient opportunity to observe accurately the matters mentioned in the statement. Where a witness gives oral evidence of the making of the statement, that witness might be effectively cross-examined as to the circumstances in which the statement was made, and as to his own credibility and reliability. The opposing party would be entitled to adopt any of these tactics at common law. He would not, however, have any opportunity to cross-examine the maker of the statement as to his credibility and reliability, except in those cases where the maker had been called as a witness and had refused to give evidence in connection with the subject-matter of the statement but remained available for cross-examination.²¹ In all other cases it is important, in the interests of fairness, to take account of the absence of the opportunity to cross-examine by enabling the opposing party, as far as possible, to attack the credibility and reliability of the maker on

¹⁶ See para 5.27 above.

¹⁷ See para 6.7 above.

¹⁸ See paras 5.21-5.24 above.

¹⁹ See paras 5.16-5.20 above.

²⁰ See para 6.3 above.

²¹ In those cases, upon the witness's refusal to give the evidence an application to lead evidence of the statement could be made. If granted, evidence of the statement could be led and the witness could be recalled for cross-examination.

the same grounds as would have been available if he had been called as a witness. Subsection (5) of clause 1 of our draft Bill is accordingly designed to make certain evidence admissible for that purpose. It is modelled on similar provisions in other legislation²² and applies where the maker of the statement is dead, ill or abroad, or has disappeared, or has been called as a witness and has refused to be sworn.

6.13 Subsection (5) contains three paragraphs which we shall set out and explain in turn. It begins:

"Where in any proceedings a statement made by any person is admitted as evidence by virtue of any paragraphs (a) to (c) and (e)(i) of subsection (1) above -

- (a) any evidence which, if that person had given evidence in connection with the subject matter of the statement, would have been admissible as relevant to his credibility as a witness shall be admissible for that purpose in those proceedings."

Thus, evidence will be admissible if it would have been admissible as relevant to the credibility of the maker if he had been called as a witness. The law as to the admissibility of such evidence seems to be less clear in Scotland than it is in England and Wales. It appears that in England and Wales evidence admissible under paragraph (a) may include evidence of bias, previous convictions, bad reputation for veracity or mental or physical condition tending to show unreliability, all of which would tend to reflect unfavourably on his credibility; and evidence of a previous consistent statement by the witness, which is admissible in order to rebut a suggestion that his evidence has been fabricated.²³ The law of Scotland by contrast seems to be in one respect somewhat uncertain. It has been suggested²⁴ that there is a general rule that evidence of facts affecting the credibility of a witness may not be led from another witness, except where those facts are also relevant to the questions at issue, or where the other witness is speaking to a previous inconsistent statement (a matter covered by paragraph (c)).²⁵ There seems to be no modern authority which supports such a general rule, however, and the older authorities are not unanimous.²⁶ In modern times the court has admitted evidence that a witness suffered from a condition which could affect the reliability of her testimony,²⁷ and in the Inner House reference has been made without adverse comment to the decision of the House of Lords in an English criminal appeal that medical evidence concerning illness or abnormality affecting the mind of a witness and reducing his capacity to give reliable evidence may in appropriate cases be admissible.²⁸ Paragraph (a) leaves room for the development of the law in this regard.

²² Subs (5) corresponds to para 2(3) of Sched 3 to the Prisoners and Criminal Proceedings (Scotland) Act 1993, which is modelled on the Criminal Justice Act 1988, Sched 2, para 1, derived in turn from the Police and Criminal Evidence Act 1984, Sched 3, para 3, based on the Civil Evidence Act 1968, s 7, which follows a recommendation by the Law Reform Committee, *Thirteenth Report (Hearsay Evidence in Civil Proceedings)* (1966, Cmnd 2964), para 33. See our *Report on Documentary Evidence*, paras 2.38-2.46.

²³ A Keane, *The Modern Law of Evidence* (3rd edn, 1994), pp 139-146; Cross, p 551.

²⁴ Walker and Walker, p 7, para 7(b).

²⁵ See paras 6.17-6.18 below.

²⁶ See 10 *Stair Memorial Encyclopaedia* para 636.

²⁷ *Green v HMA* 1983 SCCR 42 (evidence led on appeal). See also *HMA v Gilgannon* 1983 SCCR 10 (medical evidence as to accused's mental state led at a trial-within-a-trial); *Ferguson v S* 1993 SCLR 712 (evidence of child psychologist enhancing credibility and reliability of child). Cf *R v Robinson* (1994) 98 Cr App R 370.

²⁸ *McKinlay v British Steel Corporation* 1988 SLT 810 at p 813 per LJ-C Ross citing *R v Toohy* [1965] AC 595.

6.14 There is, however, a clear general rule in criminal cases²⁹ that evidence may not be led that a witness has previously made a statement which is consistent with his evidence in the witness box.³⁰ Evidence of a previous consistent statement may be led only where it was made *de recenti* or as part of the *res gestae*,³¹ or where the witness's credibility or reliability has been impugned. In the latter case the statement is admissible only to the extent necessary to enable the particular allegation of inconsistency to be rebutted.³²

6.15 Paragraph (b) provides:

"(b) evidence may be given of any matter which, if that person had given evidence in connection with the subject matter of the statement, could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examining party."

For the purpose of attacking his credibility a witness may be questioned as to his character. At common law his reply to such a question must be accepted and evidence in contradiction of his reply is excluded.³³ The object of that rule is to avoid spending time on the investigation of a collateral issue.³⁴ There is an exception to the rule where the question relates to a previous inconsistent statement by the witness, a matter separately dealt with in paragraph (c).³⁵ In practice the rule is also qualified where in cross-examination by the defence a witness falsely denies that he has a previous conviction for a crime or offence involving dishonesty: it is the practice of the Crown to demonstrate the false denial in re-examination by producing, if necessary, a relevant extract conviction.³⁶

6.16 There are two views as to how this rule should be adapted to a situation in which a party against whom hearsay evidence of a statement is adduced would have wished to cross-examine the maker as to his credibility if he had been called as a witness. On one view, any evidence of any matter as to which his denial would have been final should be excluded. This is the rule in section 7 of the Civil Evidence Act 1968, which thus preserves the English general rule as to finality on collateral issues. Another view is that that rule places the opposing party at an unfair disadvantage in a case where the maker, if appearing as a witness, would have admitted the discreditable conduct or would have denied it in an unconvincing way: accordingly, evidence as to the matter to his discredit should be admissible. The solution in the Criminal Justice Act 1988 is to allow the evidence subject to the leave of the court.³⁷ The object of the requirement of leave is to avoid the admission of evidence which might be unfair to the maker of the statement, who could not personally defend himself from attacks on his credibility, or which might be presented at such length that the trial would be unduly protracted.³⁸ The conclusion at which we have arrived is that the primary consideration is the avoidance, as far as possible, of any unfairness to the opposing party, and that accordingly the evidence should be admissible. We do not consider

²⁹ In civil cases a witness's previous statement (other than one in a precognition) is admissible both as evidence of any matter contained in it and as supporting or attacking his credibility: Civil Evidence (Scotland) Act 1988, ss 2(1)(b), 3, 9.

³⁰ *Coyle v HMA* 1994 SLT 1333 at p 1335, *sub nom C v HMA* 1994 SCCR 560 at p 564.

³¹ See 10 *Stair Memorial Encyclopaedia* paras 707 (*de recenti*), 710 (*res gestae*).

³² *Coyle*, above, at pp 1336, 565.

³³ Lewis, p 233.

³⁴ Walker and Walker, above.

³⁵ See paras 6.17-6.18 below.

³⁶ *Criminal Procedure in Scotland (Second Report)* (1975, Cmnd 6218), para 27.02; *HMA v Ashrif* 1988 SCCR 197 at p 207.

³⁷ Criminal Justice Act 1988, s 28(2), Sched 2, para 1(b).

³⁸ CLRC, para 263.

it appropriate that it should be admissible subject to the leave of the court. As we have explained,³⁹ we are of the view that there should not be any statutory discretion to exclude evidence rendered admissible in terms of the exceptions to the hearsay rule which we recommend in this Report.

6.17 Paragraph (c) provides:

"(c) evidence tending to prove that that person, whether before or after making the statement, made in whatever manner some other statement which is inconsistent with it shall be admissible for the purpose of showing that he has contradicted himself."

A witness may be asked whether he has on any specified occasion made a statement on any matter pertinent to the issue at the trial different from the evidence given by him in the trial; and if he denies that he has done so, evidence may be led to prove that he did make such a statement on the occasion specified.⁴⁰ Evidence of the statement is admissible only for the purpose of indicating that the witness's testimony in court is unreliable: it is not evidence of the truth of the facts stated in it.

6.18 Paragraph (c) adapts these rules to a situation in which a maker of a statement admitted by virtue of subsection (1) has made another statement which is inconsistent with it. Evidence of the inconsistent statement would be admissible under paragraph (a), but separate provision is made in paragraph (c) for the sake of clarity. Further, the expression "relevant to his credibility as a witness", used in paragraphs (a) and (b), does not appear in paragraph (c), which provides that the inconsistent statement "shall be admissible for the purpose of showing that he has contradicted himself" and thus covers a situation in which a perfectly honest person has made an inconsistent statement by mistake. In such a case, accordingly, it is the reliability rather than the credibility of the maker which may be attacked. Further, he may have made the inconsistent statement before or after⁴¹ he made the statement admitted under subsection (1), and he may have made it in any manner - orally, or in a document, or by conduct. The party against whom the statement is adduced has the advantage not only of leading evidence of the inconsistent statement but also of the fact that the maker, being absent, cannot explain the inconsistency. On the other hand the inconsistent statement is not admissible as evidence of its truth unless it falls within an exception to the hearsay rule.

6.19 If the accused attacks the credibility of a prosecution witness, he becomes liable to be cross-examined as to his bad character or previous convictions under proviso (f)(ii) to section 141(1) or 346(1) of the Criminal Procedure (Scotland) Act 1975.⁴² If, however, a statement is adduced by the prosecution by virtue of subsection (1) and the accused attacks the credibility of the maker by virtue of any of the provisions of subsection (5), he cannot be so cross-examined because the proviso protects him from such cross-examination "unless ... the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of the witnesses for the prosecution". While the maker of the statement may be a witness for the prosecution in effect, he is not so in fact; and in English cases the words

³⁹ See paras 4.36-4.46 above.

⁴⁰ Criminal Procedure (Scotland) Act 1975, ss 147, 349.

⁴¹ Evidence of an inconsistent statement made by a witness after he has given evidence is inadmissible under s 147 or s 349 of the 1975 Act: *Begg v Begg* (1887) 14 R 497.

⁴² *Leggate v HMA* 1988 JC 127, 1988 SLT 665, 1988 SCCR 391.

"the prosecutor or ... the witnesses for the prosecution" have been given their natural meaning.⁴³

6.20 We consider that the facts that the opposing party may attack the credibility and reliability of the maker of the statement in his absence, may lead evidence which could not have been led if he had been a witness and, if the opposing party is the accused, may do so without losing the protection of proviso (f)(ii), amount to appropriate compensation for any disadvantage which the opposing party may suffer as a result of the absence of the maker from the witness box. We therefore **recommend:**

- 14. Where a statement is admissible by virtue of any of recommendations 5 to 9 above, the following evidence relative to the maker of the statement should be admissible:**
 - (a) evidence which would have been admissible as relevant to his credibility if he had given evidence in connection with the subject-matter of the statement;**
 - (b) evidence which, if he had been cross-examined as to credibility, would have been inadmissible as being in contradiction of his answers; and**
 - (c) evidence (to show only that he has contradicted himself) which proves that he has made, before or after making the statement and whether orally or otherwise, a statement which is inconsistent with it.**

(Draft Bill, clause 1(5))

Additional evidence

6.21 Under the provisions of the Criminal Procedure (Scotland) Act 1975, as amended, the presiding judge at the trial may allow any party to lead additional evidence upon certain conditions. First, the judge must consider that the additional evidence is *prima facie* material. Secondly, he must accept that at the time the jury was sworn or, in a summary trial, at the commencement of the trial, either (a) the additional evidence was not available and could not reasonably have been made available, or (b) the materiality of such additional evidence could not reasonably have been foreseen by the party.⁴⁴ Where evidence of a statement has been led by one party by virtue of clause 1(1) and the other party has impugned the credibility of the maker of the statement by evidence led under clause 1(5), the provision recommended in the previous paragraph, the party tendering the statement may wish to lead additional evidence such as direct evidence of the matter contained in the statement or evidence in rebuttal of the attack on the maker's credibility. There may be some doubt as to whether additional evidence for the latter purpose would satisfy the condition that the additional evidence should be *prima facie* material, because the credibility of the maker might be regarded as a collateral matter.⁴⁵ Under further provisions of the 1975 Act the judge

⁴³ *R v Westfall* (1912) 7 Cr App R 176; *R v Biggin* [1920] 1 KB 213.

⁴⁴ 1975 Act, s 149(1) (substituted by the Criminal Justice (Scotland) Act 1980, s 30(1) and amended by the Criminal Justice (Scotland) Act 1987, s 70(1) and Sched 1, para 9) and s 350(1) (substituted by the 1980 Act, s 30(2) and amended by the Prisoners and Criminal Proceedings (Scotland) Act 1993, Sched 5, para 1(31)).

⁴⁵ Cf *Brown v Smith* 1982 SLT 301, 1981 SCCR 206.

may permit the prosecution to lead additional evidence in replication.⁴⁶ Here no similar doubt arises because there is no statutory condition as to the materiality of the evidence in replication.

6.22 We propose to take the course adopted in Schedule 3 to the Prisoners and Criminal Proceedings (Scotland) Act 1993 as to the leading of additional evidence where a statement in a business document has been admitted and evidence has been led challenging the credibility of the maker of the statement or the supplier of the information on the basis of which the statement was made. Paragraph 6 of Schedule 3 provides that, without prejudice to the provisions of the 1975 Act to which we have referred, the judge may grant a motion by either party for permission to lead additional evidence of such description as the judge may specify. The motion must be made before the commencement of the speeches to the jury or, in a summary trial, before the prosecutor proceeds to address the judge on the evidence.⁴⁷ The judge may permit the additional evidence to be led notwithstanding that (in solemn procedure) a witness or production concerned has not been included in a list or notice or that a witness must be recalled. The judge may adjourn or postpone the trial before permitting the additional evidence to be led.

6.23 We recommend:

15. **Where a party has led evidence under the previous recommendation, the judge should be entitled to permit either party to lead additional evidence of such description as the judge may specify.**

(Draft Bill, clause 1(6), (7))

The judge's directions to the jury

6.24 Where hearsay evidence is led by virtue of an exception to the hearsay rule under the present law, the judge directs the jury (or directs himself, if sitting alone hearing a summary trial) as to the factors relevant to the assessment of that evidence. He is required to direct the jury that hearsay evidence is different from other evidence and that, when assessing such evidence, the jury must remember that it is different from evidence on oath which has been subject to cross-examination.⁴⁸ We envisage that the same rule would apply where hearsay evidence has been led by virtue of any of the exceptions recommended in this Report.

6.25 Similar directions are given to juries in other jurisdictions when hearsay evidence is led. In *Scott v The Queen*, an appeal to the Privy Council from Jamaica, where a deposition of a witness who had died before the trial had been admitted, Lord Griffiths said:⁴⁹

⁴⁶ 1975 Act, ss 149A, 350A, both inserted by the Criminal Justice (Scotland) Act 1980, s 30(1), (2), and amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 37.

⁴⁷ It is not clear why para 6(4) of Sched 3 to the 1993 Act further requires the motion to be made in a summary trial "after the close of that party's evidence". These words were removed from s 350(1) of the 1975 Act by para 1(31) of Sched 5 to the 1993 Act after we pointed out in our *Report on Documentary Evidence*, p 21, footnote 2, that they deprived the party of his right under s 4 of the Evidence (Scotland) Act 1852 to move for the recall of a witness before his case is closed, and that a similar error in s 149(1) of the 1975 Act had been corrected by the Criminal Justice (Scotland) Act 1987, Sched 1, para 9.

⁴⁸ *Higgins v HMA* 1993 SCCR 542 at p 552. See also *Smith v HMA* 1994 SCCR 72 at pp 78-79.

⁴⁹ [1989] AC 1242 at p 1259; applied, *Henriques v The Queen* (1991) 93 Cr App R 237, [1991] 1 WLR 242.

"It will of course be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross-examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition. No doubt in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the deposition which conflict with other evidence and which could have been explored in cross-examination: but no rules can usefully be laid down to control the detail to which a judge should descend in the individual case."

In *R v Cole*, where a statement by an eye-witness who had died before the trial was admitted, it was conceded on appeal that if it had been properly admitted, the trial judge's direction in the following terms was correct and fair:⁵⁰

"As far as Mr Luff's statement is concerned, you have heard it read out. It has these obvious limitations: when someone's statement is read out you do not have the opportunity of seeing that person in the witness box and sometimes when you see someone in the witness box you get a very much clearer opinion of whether or not that person is sincere and honest and accurate. Furthermore, when that evidence is tested under cross-examination you may get an even clearer view. Sometimes cross-examination takes away very much from a witness's reliability, sometimes it adds to it so you can say, 'despite the testing I am absolutely certain he is right', but that process cannot happen in the present case because Mr Luff is dead so I would suggest to you that you cannot possibly pay as much attention to Mr Luff's evidence as anybody else but for what it is worth let me summarise it."

6.26 We do not think it necessary or desirable to impose any statutory duty on the trial judge to direct the jury in any particular way. A provision as to judicial directions appears in the Evidence Bill now before the Parliament of the Commonwealth of Australia. The Bill sets out the federal rules of evidence and is based on recommendations by the Law Reform Commission of Australia.⁵¹ Clause 165 sets out categories of evidence that may be unreliable, including hearsay evidence, and provides that where there is a jury and a party requests that a warning be given, the judge is to warn the jury that such evidence may be unreliable, inform them of matters that may cause it to be unreliable, and warn them of the need for caution in determining whether to accept the evidence and the weight to be given to it. The judge is not required to use a particular form of words. The clause also provides, however, that the judge need not give any warning or information if there are good reasons for not doing so. While such a provision may be necessary in a statute which in effect codifies the whole law of evidence, we do not consider it to be required in our draft Bill, which deals with a branch of the law of evidence where the rules as to directions to juries are already clear.

The European Convention on Human Rights

6.27 We now discuss the question whether our recommendations in Part V and in this Part are consistent with the provisions of the European Convention on Human Rights which we have already considered in Part IV.⁵² In Part V we have set out our proposed exceptions to the hearsay rule⁵³ and we have pointed out the categories of inadmissible hearsay

⁵⁰ (1990) 90 Cr App R 478 at p 481.

⁵¹ *Evidence* (1987, ALRC 38).

⁵² See paras 4.3-4.19, 4.49-4.50 above.

⁵³ See paras 5.29-5.62 above.

evidence which are not affected by our recommendations.⁵⁴ Our recommendations maintain the traditional preference for direct oral evidence over other kinds of evidence as the evidence to be led as to the facts in dispute in a criminal trial. It is only where a person's direct oral evidence is unavailable for some very good reason that hearsay evidence would be admissible. The object of our recommendations on procedure is to admit such evidence without unduly complicating or delaying the trial.

6.28 The new law would apply equally to the prosecution and the defence. Regarded from the standpoint of the defence, the recommended exceptions to the hearsay rule seem to us to be likely to enable accused persons to lead any hearsay evidence which is necessary for their defence. The categories of hearsay which continue to be inadmissible, such as statements on precognition and multiple hearsay, appear to us to be justifiable on the ground of the unreliability of such evidence. While our scheme extends the categories of hearsay which the prosecution may lead against an accused person, it seems to us to be probable that the European Court of Human Rights would hold that his right to a fair trial under the Convention was preserved by the following safeguards.

- (1) Before the hearsay could be admitted, the prosecutor would be required to satisfy the court that it met the statutory conditions for admissibility. The defence would be entitled to challenge the prosecutor's submissions on these matters.
- (2) At the trial, the defence would be entitled to lead evidence in rebuttal of the contents of the statement.
- (3) The defence would also be entitled at the trial to attack the credibility and reliability of the maker of the statement, and of the witness who reported the statement to the court either by giving direct oral evidence of its making or by speaking to a document in which it was contained. The defence would be entitled to apply to the judge for leave to lead additional evidence for the purpose of making such an attack on the maker of the statement.
- (4) The judge would be required to give appropriate directions to the jury (or to himself, in a summary trial) as to the factors relevant to the assessment of the statement.
- (5) Since in a Scottish criminal trial a material fact may be proved only by corroborated evidence, the accused could not be convicted on the basis of an unsupported item of hearsay evidence.

6.29 Notwithstanding these safeguards, however, it does not appear to us to be possible to be certain that the European Court of Human Rights would take the view that a conviction based to any extent on hearsay evidence led under our scheme did not contravene the Convention. The risk of contravention might be greatest where a material fact had been proved by *two* items of hearsay evidence: for example, where the Crown evidence of identification of the accused as the perpetrator of the crime consisted of two hearsay statements. It is doubtful whether such evidence would be admitted under the

⁵⁴ See paras 5.70-5.80 above.

present law in other parts of the United Kingdom. In *Neill v North Antrim Magistrates' Court*⁵⁵ two youths made statements to the police in which they claimed to have witnessed an assault and identified one of the perpetrators. Their statements were admitted at committal on the ground that they had refused to give oral evidence through fear. A statement made by a person in a document is admissible on that ground under article 3 of the Criminal Justice (Evidence, Etc) (Northern Ireland) Order 1988 if the court is satisfied that it is in the interests of justice to admit it. The House of Lords held that the statements should not have been admitted on that ground because that ground had not been proved by admissible evidence, but by evidence of what the youths' mothers had said to a police officer. Lord Mustill, with whom the other members of the House agreed, said:⁵⁶

"For the reasons stated, I consider that if the police officer's evidence had been that the two young men had spoken to him directly of their fear, their witness statements would have been potentially admissible under article 3. I say 'potentially' because even on a committal, as distinct from a trial, the court will be cautious about admitting in evidence, and founding a decision upon, documentary evidence of identification (or, as in the case of one of the two young men, recognition) where this is the principal element in the prosecution's case."

6.30 Under the Order considered in *Neill* and the corresponding provision of the Criminal Justice Act 1988⁵⁷ a statement which satisfies the statutory conditions of admissibility attached to the relevant exception to the hearsay rule is nevertheless inadmissible unless the court is satisfied that it ought to be admitted. Under our scheme, however, the court would have no discretion to exclude a statement which satisfied the statutory conditions.⁵⁸ It would be for the Crown to decide, when preparing a case for trial, whether to rely to any extent on an item of hearsay evidence which met the statutory conditions. The decision would have to be taken in the light not only of the decisions of the European Court to which we have drawn attention in Part IV,⁵⁹ but of any relevant decisions of the Court which may be issued after the submission of this Report. The Court's view of the bearing of the admission of hearsay on the fairness of a trial may alter in the future, as it appears to have done in the past.

⁵⁵ (1993) 97 Cr App R 121, [1992] 1 WLR 1220, [1992] 4 All ER 846.

⁵⁶ (1993) 97 Cr App R at p 129, [1992] 1 WLR at p 1229, [1992] 4 All ER at p 855. The punctuation above follows that of the All ER report.

⁵⁷ Order, art 6; 1988 Act, s 26. See para 4.42 above.

⁵⁸ See paras 4.33-4.46 above.

⁵⁹ See paras 4.5-4.19 above.

Part VII Prior statements of witnesses

Introduction

7.1 We consider in this Part the rule that a previous statement of a witness who is giving evidence is inadmissible as evidence of the truth of what the witness then said. We summarise the present law and refer to the responses to our proposals in the Discussion Paper before making our recommendations.

The present law

7.2 Under the present law, a statement made by a witness before the trial (a prior statement) is admissible as evidence of the truth of its contents only in exceptional cases.¹ In certain circumstances such a statement is admissible for the limited purpose of establishing the fact that the statement was made; and there are different rules according as the prior statement is consistent with,² or inconsistent with,³ the evidence which the witness gives in court. In all cases, however, a prior statement made by a witness on precognition is inadmissible.⁴

7.3 As a general rule, evidence that a witness has made a prior statement which is *consistent* with his testimony in the witness box is inadmissible, no doubt because such evidence would be superfluous.⁵ Exceptionally, such evidence is admissible where the witness is the complainer and has made the statement *de recenti*, that is, shortly after the alleged crime, at his or her first opportunity to speak to a natural confidant.⁶ The evidence is admitted, however, only on the ground that the fact that the statement was made is relevant to the credibility of the witness, as showing that he or she has told in the witness box substantially the same story as he or she gave at that time. By a further well-recognised exception to the general rule, a witness who has identified the accused in court and states that he identified him on a previous occasion, such as an identification parade, gives evidence of a prior consistent statement.⁷ A prior consistent statement is also admissible in order to rebut an allegation that the witness's testimony is inconsistent with a statement made by the witness on a specified previous occasion.⁸ Here again, however, the statement is admissible only for the limited purpose of supporting his or her credibility: it cannot supply corroboration of his or her evidence in court.

7.4 Evidence of a witness's prior *inconsistent* statement may be admitted under the following statutory rule. It is competent to ask a witness whether he has on any specified occasion made a statement on any matter pertinent to the issue which is different from the

¹ See paras 7.6-7.8 below.

² See para 7.3 below.

³ See para 7.4 below.

⁴ See para 5.4 above.

⁵ Cross, p 281.

⁶ 10 *Stair Memorial Encyclopaedia*, para 707.

⁷ See para 7.5 below.

⁸ *Coyle v HMA* 1994 SLT 1333, *sub nom C v HMA* 1994 SCCR 560.

evidence given by him in the trial. If he denies that he has done so, evidence may be led to prove that he did make such a statement on the occasion specified.⁹ Once again, however, evidence of the prior statement is admissible only for the purpose of indicating that the witness's testimony in court is unreliable: it is not evidence of the truth of the facts stated in the prior statement, unless the witness admits that his evidence has been inaccurate and that the contents of the statement are true.

7.5 There are special rules about a witness's prior statement in which he has identified or described the accused. If the witness identifies the accused in court as the culprit and also depones that he accurately identified him as the culprit to a police officer on an earlier occasion, the police officer's evidence of the earlier identification is admitted to support the credibility of the witness's identification in court.¹⁰ That is a common occurrence in practice. Another situation which frequently arises in court is that a witness fails to identify the accused in court but states that he made an accurate identification of the culprit to the police on an earlier occasion. Here, the evidence of the police as to that identification may be led in order to prove that the person whom the witness identified was the accused.¹¹ These are long-established rules.

7.6 In recent times the Full Bench case of *Muldoon v Herron*¹² established a further rule: if in court the witness fails to identify the accused, admits that he made a prior identification to the police but *denies* that he then identified the accused, evidence is admissible from the police officers to prove that he *did* identify the accused. The evidence of the police is not evidence which is independent of, and may be preferred to, the evidence of the witness: it depends on the witness's admission in court that he had pointed out the culprit to the police, and is evidence, not of the accuracy of the identification which was made, but of who was in fact identified.¹³ The long-established rules referred to in paragraph 7.5 above and the further rule in *Muldoon* are examples of the application of the proposition that if a witness states on oath that he identified the culprit to the police shortly after the event, it may be established by the evidence of the police who the person was who was so identified.¹⁴

7.7 The old rule as to prior identification by a witness who in court fails to identify the accused, but admits that he made a prior identification,¹⁵ was extended to evidence of a prior description in *Frew v Jessop*.¹⁶ Thus, where a witness in court fails to identify the accused but states that he gave to police officers a description of the culprit which he cannot now remember, the police officers' evidence as to the description is admissible. In *Frew v Jessop* the Court also observed:¹⁷

⁹ Criminal Procedure (Scotland) Act 1975, s 147 (solemn procedure) and s 349 (summary procedure). The prosecution may be permitted to lead additional evidence in order to prove the prior statement: 1975 Act, ss 149A(1)(b), 350A(1)(b).

¹⁰ *HMA v Wight* (1836) 1 Swin 47 at pp 48-49; *R v Christie* [1914] AC 545 per Viscount Haldane LC at p 551.

¹¹ A Alison, *Practice of the Criminal Law of Scotland* (1833), pp 627-628, approved in *Muldoon v Herron* 1970 JC 30, 1970 SLT 228.

¹² *Supra*. See also *Smith v HMA* 1986 SCCR 135; *Maxwell v HMA* 1991 SLT 63, 1990 SCCR 363.

¹³ *Muldoon, supra*, L J-C Grant at pp 36, 232.

¹⁴ *Ibid*, L J-C Grant at pp 36, 232; Lord Walker at pp 42-43, 235-236; Lord Cameron at pp 48-49, 238-239.

¹⁵ See para 7.5 above.

¹⁶ 1989 SCCR 530, 1990 SLT 396.

¹⁷ 1989 SCCR 530 at p 534, 1990 SLT 396 at p 398. See also *Muldoon v Herron* 1970 JC 30, 1970 SLT 228 per L J-C Grant at pp 34, 231.

"It is not at all unusual for a witness to testify that he witnessed an accident and had noted the number of the vehicle and had informed the police of this at the time, but that by the time he gives his evidence he is quite unable to recall the registered number of the vehicle which he had reported to the police. In that situation it is quite competent for evidence to be led from police officers as to the number of the vehicle which the witness had reported to them at the time."

In England the courts have reluctantly held such evidence to be inadmissible hearsay.¹⁸

7.8 In *Jamieson v HM Advocate (No 2)*¹⁹ the High Court applied the principle in *Muldoon v Herron*²⁰ in a case where a witness stated in court that she was unable to remember an incident but that she had made a truthful statement about it, the contents of which she also could not remember, to the police. Later in the trial the police officer to whom the witness had made the statement gave evidence of the contents of the statement. The trial judge directed the jury that they could regard the statement as part of the witness's evidence because she had incorporated it into her evidence by saying that whatever she had told the police was true. The accused appealed on the ground that the police officer's evidence about what the witness had said was inadmissible hearsay. Refusing the appeal, the Court said:²¹

"The *Muldoon* case dealt with the position of a missing link in evidence of identification. The opinions in that case, including the dissenting opinion by Lord Wheatley, were all directed to the question of identification evidence and the case does not provide direct authority for the direction which was given by the trial judge in this case. But in our opinion the principle upon which the evidence of identification was held to be admissible in that case is of wider application and is not confined to identification evidence. Where a person identifies the alleged culprit to police officers, he is in effect telling them what he saw. He is making a statement to the police officers which is a statement of fact and ought, if possible, to be spoken to by the witness in the witness box. But if he is unable to recollect what he said to the police when he comes to give evidence, the gap in his recollection can be filled by what the police said he said to them at the time. This evidence, when taken with the witness's own evidence that he made a true statement at the time to the police, is held to be admissible because there are two primary sources of evidence. One is the evidence of the police officers as to who was in fact identified and the other is the witness's own evidence that he identified the culprit to the police. The consistency between these two pieces of evidence provides the link between them and completes the chain. As Lord Cameron said in *Muldoon* at p.46, neither of these facts proves identity, but both are elements in the structure of evidence from which identification may be held proved.

"In the present case there were two primary sources of evidence. One was the evidence of D.C. Farman as to what Marianne Robertson said to him in her statement. The other was Marianne Robertson's evidence that she made a statement to the police officer and that what she said to him at the time was true. Her evidence that she had made a statement to the police officer did not go to the length of admitting any of the details of what she may have said to him. She said that she could not remember this, so there was a gap in her evidence. But her evidence that she told the police the truth and that, if she said at the time she saw the appellant

¹⁸ *Jones v Metcalfe* [1967] 1 WLR 1286, [1967] 3 All ER 205; *McLean* (1967) 52 Cr App R 80. See CLRC, paras 231, 254; A Ashworth and R Pattenden, "Reliability, hearsay evidence and the English criminal trial" (1986) 102 LQR 292 at pp 298-300.

¹⁹ 1994 SCCR 610.

²⁰ 1970 JC 30, 1970 SLT 228; see para 7.6 above.

²¹ 1994 SCCR 610 at pp 618-619.

hitting Camy it must be true, had the effect, as the trial judge said, of incorporating her statement to the police into her own evidence. Taken separately neither the evidence of the police officer nor what she said in her own evidence implicated the appellant in the assault on the complainer. But taken together, as elements in the whole structure of the evidence, they had that effect.

"We do not therefore accept Mr Di Rollo's primary submission. In our opinion it was not necessary for Marianne Robertson to recall the details of her statement to the police officer. It was sufficient that she said that she had made a statement to him at the time and that what she told him was the truth."

Later in this Report we shall recommend that the ratio of *Jamieson v HM Advocate (No 2)* should be embodied in legislation as to the admissibility of prior statements contained in documents.²²

7.9 In civil proceedings the law is very different, in view of the abolition of the hearsay rule in civil cases by the Civil Evidence (Scotland) Act 1988. Evidence of a witness's prior statement may be led not only for the purpose of supporting or attacking the witness's credibility, but also as evidence of the facts contained in the statement: only statements in precognitions are inadmissible.²³ There are several reported cases where a civil court has proceeded on hearsay evidence of a witness's prior statement. In a case where one of the defenders had been convicted of fraud, the court preferred statements he had made before and at his trial to his evidence in the civil proceedings before the court.²⁴ In an application to the sheriff under the Social Work (Scotland) Act 1968 to which the 1988 Act applied, a statement a child witness had made to the police was held to be truthful although she retracted it in court.²⁵ In another such application, a finding was made on the basis of hearsay evidence of statements made by a child witness although the child, when giving evidence, had not been asked about the matters contained in the statements.²⁶ The 1988 Act is derived from the recommendations in our *Report on Corroboration, Hearsay and Related Matters in Civil Proceedings*.²⁷ We have already observed, however, that there are compelling reasons why the abolition of the hearsay rule should not be extended to criminal proceedings.²⁸

Our Discussion Paper, the responses and our Report on Children's Evidence

7.10 In the Discussion Paper we noted that it might seem anomalous that the prior statement of a witness might be admissible as evidence of fact if it related to a prior identification of an accused under certain circumstances, but could not be evidence of fact if it dealt with other matters. We suggested that there was no reason in principle why a prior inconsistent statement should be admissible as evidence of fact in some circumstances but not in others. We pointed out that the prior statement of a witness might also be the best evidence available, given that by the time a case goes to trial the witness might have forgotten the details of an event. We therefore sought views on the proposition that in criminal proceedings where a person had been examined as to a prior statement (other than

²² See paras 7.39-7.49 below.

²³ Civil Evidence (Scotland) Act 1988, ss 2, 3, 9.

²⁴ *M & I Instrument Engineers Ltd v Varsada* 1991 SLT 106.

²⁵ *K v Kennedy* 1993 SLT 1281, 1992 SCLR 386.

²⁶ *F v Kennedy (No 2)* 1993 SLT 1284, 1992 SCLR 750.

²⁷ (1986) Scot Law Com No 100, Pt III.

²⁸ See paras 2.11-2.12 above.

a precognition) made by him, that prior statement should be admissible as evidence of the facts contained in it and to support or attack the credibility of that person.²⁹

7.11 The weight of opinion among those who commented on that proposition was against such a radical reform of the law. We are persuaded that their views are well-founded. We are influenced by the following considerations. If any kind of prior statement were to be admissible, irrespective of whether the witness adopted its contents as his evidence, an accused could be convicted on the basis of prior statements attributed to witnesses by police officers, even though the witnesses denied having made such statements.³⁰ In any event, where a witness denied the terms of the alleged prior statement, much time could be spent at the trial in determining whether the statement was made and if so, what were its terms. It might be necessary to elicit the circumstances in which it was made and to assess with particular care the credibility and reliability of the witness reporting the statement.

7.12 When we prepared our *Report on Children's Evidence*³¹ we took our consultees' responses into account and recommended that a witness's prior statement should be admissible as evidence of the facts stated in it only if certain conditions were satisfied. These conditions were (a) that the accuracy of the evidence about the prior statement was in some way assured, and (b) that the maker of the statement adopted its contents in the witness box. As to condition (a), we recommended that the statement should be in written form and signed by the witness, or in the form of an audio or video-recording, or in some other permanent form from which it could reasonably be inferred that it accurately and completely recorded what was said by the witness on the previous occasion.³² We further recommended that the prior statement should not be inadmissible solely because it had been elicited in response to questions, such as leading questions, which would have been disallowed had they been put to the witness in that form in court.³³ Clause 8 of the draft Bill annexed to our Report was designed to give effect to these recommendations.

Summary of our recommendations

7.13 The recommendations concerning witnesses' prior statements in our *Report on Children's Evidence* have not been implemented. We have therefore taken this opportunity to reconsider them. The recommendations in the following paragraphs of this Part, and clause 2 of our draft Bill in Appendix A, are accordingly intended to replace recommendations 18 and 19 and clause 8 of the draft Bill in our *Report on Children's Evidence*. We have given further thought to the matter in the light of the principles to which we have already referred: the simplification of the law and an extension of the categories of admissible relevant evidence, so far as consistent with the nature and purpose of a criminal trial.³⁴

7.14 When applying these principles to the admissibility of prior statements by witnesses, there appear to us to be two matters which should be addressed. First, if a prior statement by a witness is of such a nature that its reliability may be accurately assessed by a properly directed jury, it should be admissible not only to support or undermine the witness's

²⁹ DP, paras 4.15-4.17, prop 10.

³⁰ See paras 7.18-7.19 below.

³¹ *The Evidence of Children and Other Potentially Vulnerable Witnesses* (hereafter "*Report on Children's Evidence*") (1990) Scot Law Com No 125, paras 4.45-4.70.

³² *Ibid*, para 4.66, recommendation 18.

³³ *Ibid*, para 4.70, recommendation 19.

³⁴ See paras 2.26-2.30 above.

credibility, but also as evidence of the truth of its contents, whatever the witness may say in court about the matters dealt with in the statement. The categories of statements which we propose to recommend for this purpose are statements in precognitions on oath and statements in prior proceedings.³⁵ That would simplify the law and render admissible reliable evidence which, under the present law, is inadmissible for that purpose.

7.15 Secondly, if a witness finds it difficult to give evidence in court -whether because his or her memory of events is no longer accurate, or because he or she is under considerable stress due to the grossly unpleasant or embarrassing nature of the evidence, or for any other reason - a prior statement by him or her should be admissible provided that, as in *Jamieson v HM Advocate (No 2)*,³⁶ the witness accepts that he or she made a statement and adopts it as his or her evidence. The kinds of statements to which our recommendation refers are statements which are contained in documents. We have already recommended a very broad definition of "document"³⁷ and explained what we mean by "a statement contained in a document".³⁸ Our recommendation would thus extend to statements in audio or video recordings. Our object is to remove the difficulty faced by an honest witness who says, in effect, "I cannot remember that now, but what I said at the time was accurate", or who finds it unduly distressing to talk about intimate matters in the witness box but would be able to acknowledge the truth of a statement which he or she had made on a previous occasion. Here again, we think, difficulties would be removed and information which is of sufficient importance to be worthy of consideration by the jury would be clearly admissible.

7.16 In each case the effect of our recommendations is that the prior statement would be no more than an admissible item of evidence for the jury's consideration. The witness could be examined and cross-examined as to the truth of its contents and the circumstances in which it was made, and contradictory evidence could be led about the matters dealt with in the statement. Further, we propose that any objection which could have been properly taken if the contents of the statement had been given orally, may be taken to the statement or any part of it, or to any question which is recorded as having been put to the witness.³⁹

Rules not affected by our recommendations

7.17 Our recommendations are intended only to widen the range of witnesses' prior statements which are admissible as evidence of matters contained in them: they are not intended to render inadmissible any prior statements which are admissible under the present law.⁴⁰ In particular, our recommendations do not affect the present law as to evidence of prior identification or description,⁴¹ or as to prior statements by the accused.⁴² Nor do they affect sections 147 and 349 of the Criminal Procedure (Scotland) Act 1975 whereby a prior inconsistent statement may be admitted in order to attack the credibility of

³⁵ See paras 7.20-7.29 below.

³⁶ 1994 SCCR 610; see para 7.8 above.

³⁷ See para 5.14 above.

³⁸ See paras 5.16-5.18 above.

³⁹ See paras 7.43, 7.58 below.

⁴⁰ See para 5.3 above. On the relationship between our recommendations and *Jamieson v HM Advocate (No 2)* 1994 SCCR 610, see para 7.43 below.

⁴¹ See paras 7.5-7.7 above.

⁴² See paras 5.71-5.77 above.

the witness,⁴³ except that where the statement has been made in a precognition on oath or in prior proceedings it will also be admissible as evidence of the matters stated in it.

7.18 The present general rule that a witness's prior inconsistent statement may be admissible only to indicate the unreliability of his testimony, and not as evidence of the matters stated in it, has often been questioned.⁴⁴ As we have already observed, however, if such statements were to be admissible as evidence of the facts stated, an accused could be convicted on the basis of such statements.⁴⁵ In *R v Hall*,⁴⁶ a case in Queensland where the law allows a witness's prior inconsistent statement to be adduced as evidence of the facts it contains, the appellant's co-accused, who had pleaded guilty to the charge at an early stage of the trial, was called as a witness by the Crown, but proved hostile. The Crown therefore called police witnesses to prove a prior inconsistent statement in which he had implicated the appellant. The Queensland Court of Criminal Appeal upheld the accused's subsequent conviction. In another Queensland case, *Siedofsky*,⁴⁷ the accused was charged with sexual offences against his stepdaughter. After she had stated in evidence that she could not remember certain events, she was declared an adverse witness and the Crown adduced a prior inconsistent statement which supported the charges. She said at some stages that she could not remember the events narrated in the statement, and at others that they were untrue. The jury nevertheless convicted the accused and the Queensland Court of Criminal Appeal dismissed his appeal, although they observed that "the unusual combination of circumstances called for considerable caution".

7.19 While in each of these cases the course taken by the Crown may have been justifiable on pragmatic grounds and may have led to a just result, it is a course which, in general, we would view with some uneasiness. Unless and until statements by witnesses to the police come to be reliably recorded on audio or video tape, it is quite possible that through error or even malpractice there could be attributed to witnesses, and accepted by the jury, prior statements implicating the accused which were dangerously misleading because they had not been correctly recorded in writing. The necessity of preventing, as far as possible, any miscarriage of justice which might be so caused⁴⁸ has led us to recommend that the only prior statements which should be admissible as evidence of the truth of their contents, irrespective of whether they are adopted or repudiated by the witness, should be statements made in precognitions on oath or in other proceedings.⁴⁹

Prior statements as evidence of their contents

7.20 In this section of this Part we specify in detail the categories of witnesses' prior statements which we recommend should be admissible as evidence of any fact or opinion contained in them. We intend that our recommendations should apply to either a part or the whole of a prior statement,⁵⁰ and that "statement" should have the same meaning as in Part V.⁵¹ We assume that any statement to which our recommendations apply would be

⁴³ See para 7.4 above.

⁴⁴ See the dicta collected in R Munday, "Calling a hostile witness" [1989] Crim L R 866 at pp 866, 873-874.

⁴⁵ See para 7.11 above.

⁴⁶ [1986] 1 Qd R 462.

⁴⁷ (1988) 34 A Crim R 268.

⁴⁸ See para 2.8 above.

⁴⁹ See paras 7.21-7.29 below.

⁵⁰ See para 5.20 above, recommendation 2(a)(ii).

⁵¹ See paras 5.4-5.13, 5.20 above.

relevant, that is, that it would have "a reasonably direct bearing on the subject under investigation".⁵² If it was irrelevant, the ordinary rules of evidence would apply and it would be inadmissible. Our object, as we have said, is to modify the extent to which the hearsay rule prohibits the admission of relevant evidence.⁵³

Precognitions on oath; statements in prior proceedings

7.21 The prior statements which would be admissible under our recommendations fall into two groups. In the first, which consists of statements in precognitions on oath or in prior proceedings, we propose that the statement should be evidence of the matters contained in it irrespective of what the witness might say about its truthfulness in court. The factors which cause us to regard such a statement as particularly worthy of consideration by the jury are not merely that when the witness made it he was on oath⁵⁴ and obliged to tell the truth: it is even more important that he made the statement in formal proceedings under the control of a judge whose duty it was to see to it that the interrogation of the witness was fair and he was not subjected to any improper pressure.⁵⁵ Where the questions asked and the terms of his replies have been noted by a court shorthand-writer,⁵⁶ the probable accuracy of the record and its indication of the context in which particular answers were given are further arguments for its admissibility. It appears to us that even if the witness says at the trial that the statement is untrue, these considerations are sufficient to entitle the jury to consider it after receiving appropriate directions from the judge. They would be entitled to take the view that when the witness made the statement he was speaking honestly and further, if they so wished, to accept the statement as reliable evidence in the case before them.⁵⁷ They would have before them two different sworn statements by the witness, one made on precognition on oath or in other proceedings and the other made before them in the witness box, and they would be able to assess both statements and either choose between them or decide that it would not be safe to rely on either of them.

7.22 We consider that if such prior statements were to be admissible as evidence of the truth of their contents, two legitimate purposes would be served. First, the jury would be provided with material of a potentially reliable character which might well be of great value in the ascertainment of the truth. Secondly, a turncoat witness who wished to conceal the truth from the jury, even at the risk of a subsequent prosecution for perjury,⁵⁸ would know that they were entitled to prefer his earlier account and he would have the task of trying to convince them that that account should not be believed. In some cases a jury, faced with a witness who showed himself to be capable of telling two different stories on oath, would be wise to ignore his evidence altogether, but cases vary so widely in their circumstances that there should be no general rule to that effect. In a case where the prior statement was more

⁵² *W Alexander & Sons Ltd v Dundee Corporation* 1950 SC 123, 1950 SLT 76 per L J-C Thomson at pp 131, 79-80.

⁵³ See paras 2.30, 7.13 above.

⁵⁴ For convenience we refer only to statements on oath or sworn statements, although the same considerations apply to evidence given on affirmation or by a child after an admonition.

⁵⁵ In this respect the statement resembles an accused's statement at judicial examination where the presence of the sheriff, in order to protect the accused against improper questioning, is an essential condition of the admissibility of the statement: *McMillan* (1858) 3 Irv 213; A Alison, *Practice of the Criminal Law of Scotland* (1833), pp 560-561; Criminal Procedure (Scotland) Act 1975, s 20A(2).

⁵⁶ An official shorthand note is taken at a precognition on oath, a criminal jury trial and an ordinary civil proof or jury trial. See para 7.28 below.

⁵⁷ On the distinction between credibility and reliability see para 6.12 above.

⁵⁸ If the Crown were able to establish the true facts, he could be prosecuted for perjury committed in whichever of the proceedings he had given sworn evidence of the false version.

damaging to the accused than the witness's evidence at the trial, the judge would no doubt wish to give the jury particularly careful directions as to the assessment of the weight to be attached to the prior statement, but the nature of the directions would depend on the circumstances of the case.

Precognitions on oath

7.23 We have already discussed precognitions on oath in the context of our proposed definition of "statement" and have recommended that statements in precognitions on oath should form an exception to the rule that statements in precognitions should be inadmissible.⁵⁹ It follows that a statement in a precognition on oath which had been given in evidence by a person whose evidence was unavailable as a witness for any of the reasons specified in clause 1(1) of the draft Bill would be admissible as evidence of the truth of its contents. Under the present law, where a witness has made a statement in a precognition on oath the statement is admissible only for the purpose of attacking the credibility of his evidence in court,⁶⁰ or for the purpose of supporting his credibility where an allegation of inconsistency has been made.⁶¹ We consider, however, that if there is a good case for admitting such a statement as evidence of its contents when the maker is unavailable, there is an even stronger case for doing so when the maker is present in court as a witness and is thus available for examination and cross-examination as to the contents of his precognition on oath and the circumstances in which it was taken.

7.24 We therefore **recommend**:

- 16. Where a witness has made a statement in a precognition on oath that statement should be admissible as evidence of any matter stated in it of which direct oral evidence by him would be admissible if given in the course of the proceedings.**

(Draft Bill, clause 2(1), (4)(a))

Statements in prior proceedings

7.25 If our recommendations in Parts V and VI were implemented, a statement made in other proceedings by a person whose evidence was not available at the trial would be admissible as evidence of the truth of its contents if it fell within one of the recommended exceptions to the hearsay rule. As with precognitions on oath, we think that there is even more reason to admit such a statement where the maker appears as a witness at the trial.

7.26 We note that Lord Wheatley disapproved of this course in *Cole-Hamilton v Boyd*⁶² where a witness stated that he could not remember the details of a road accident and it was submitted that his Lordship should consider his evidence in a previous action arising out of the same accident. Since his Lordship did not accept the witness's evidence of loss of recollection, his observations on the submission are obiter. He pointed out that the only authority cited⁶³ was opposed to it and that the previous action had been "between different

⁵⁹ See paras 5.5, 5.20 above.

⁶⁰ *Coll, Petr* 1977 JC 29, 1977 SLT 58.

⁶¹ *Coyle v HMA* 1994 SLT 1333, *sub nom C v HMA* 1994 SCCR 560; see para 7.3 above.

⁶² 1963 SLT (Notes) 77 (OH: sequel to 1963 SC (HL) 1, (*sub nom Purden's C B v Boyd*) 1963 SLT 157).

⁶³ Dickson, paras 1716-1723.

parties with possibly different interests". It is true that the present law does not support the submission. We think, however, that if the law were to be as we recommend, the jury would be directed to regard with caution the evidence in prior proceedings of a witness who was shown at the trial to be dishonest or not to be making any reasonable attempt to recall the matters he was being asked about; and that while the identity and interests of the parties to the prior proceedings might have a bearing on the nature and scope of the evidence which the witness then gave, the jury would be able to understand and apply a direction that that should have a bearing on their assessment of the weight of that evidence.

7.27 We propose that the other proceedings in which the prior statement was made should be any proceedings, whether criminal or civil, which have taken place in the United Kingdom or elsewhere.⁶⁴ We think it is likely that any provision based on our recommendation would be most frequently relied on where the witness had given evidence in prior proceedings in Scotland such as a previous criminal trial arising from the same circumstances as that in which he is now required to give evidence.⁶⁵ We consider, however, that the provision should be framed in terms which would permit proof of a statement made in any other proceedings, civil or criminal, in Scotland or elsewhere. While it seems likely that in most cases the prior proceedings would have taken place within the United Kingdom, it seems desirable to make provision for any unusual case in which a relevant prior statement had been made in proceedings in a jurisdiction outside the United Kingdom. It seems reasonable to assume that in such proceedings it would have been the duty of the witness to make the statement with care and that he made it in circumstances of some formality, so that there is attached to the statement a sufficient degree of significance to render it appropriate for the jury's consideration. As with proceedings in the United Kingdom, the nature of the proceedings, the issues and the parties might be relevant factors in the jury's assessment of the weight of the statement.

7.28 We envisage that where the evidence in the other proceedings had been recorded by a shorthand-writer,⁶⁶ the statement might be proved by means of an agreed transcript of the shorthand notes and not necessarily by the evidence of a person or persons who had heard the statement being made. If the transcript were not admitted by agreement, it would be necessary for a witness to speak to it.⁶⁷ Proof of the statement by a person or persons who had heard it being made would be required where no shorthand note had been taken⁶⁸ or no transcript was produced.⁶⁹ We note that it may be difficult for the defence to obtain a transcript of the shorthand notes of evidence in a Scottish criminal trial,⁷⁰ unless the trial is a retrial following upon the High Court's authorisation of a new prosecution.⁷¹ It appears that

⁶⁴ Cl 2(4)(b) of the draft Bill expressly so provides lest it be thought to refer only to statements made in proceedings in Scotland: cf *Comex Houlder Diving Ltd v Colne Fishing Co Ltd* 1987 SLT 443 (HL).

⁶⁵ The latter trial might be, but need not be, a retrial in terms of the Criminal Procedure (Scotland) Act 1975, ss 254(1)(c), 255, 452A(1)(d), 452B, 453A(2) or (much more rarely) s 280A(2).

⁶⁶ See third footnote to para 7.21 above.

⁶⁷ *McGiveran v Auld* (1894) 1 Adam 448, 21 R (J) 69. It might be admissible as a business document in terms of para 2 of Sched 3 to the Prisoners and Criminal Proceedings (Scotland) Act 1993. Cf *Barkway v South Wales Transport Co Ltd* [1949] 1 KB 54; *Ventouris v Mountain (No 2)* [1992] 1 WLR 887.

⁶⁸ *Banaghan v HMA* (1888) 1 White 566, 15 R (J) 39. Sheriffs are sometimes called as witnesses in perjury trials to testify to the evidence given before them by the accused in a summary trial, eg *Davidson v McFadyean* 1942 JC 95, 1943 SLT 47.

⁶⁹ *M & I Instrument Engineers Ltd v Varsada* 1991 SLT 106 at p 109.

⁷⁰ Criminal Procedure (Scotland) Act 1975, s 275(3), (5); *Storrie v Murray* 1974 SLT (Sh Ct) 45; *McGowan v Mein* 1976 SLT (Sh Ct) 29; Macphail, paras S25.16-S25.18.

⁷¹ See second footnote to para 7.27 above.

in the absence of a transcript the defence may call the shorthand writer, who may refer to his notes.⁷²

7.29 We therefore **recommend**:

17. **Where a witness has made a statement in other proceedings, whether criminal or civil, and whether taking place in the United Kingdom or elsewhere, that statement should be admissible as evidence of any matter stated in it of which direct oral evidence by him would be admissible if given in the course of the proceedings.**

(Draft Bill, clause 2(1), (4)(b))

Video recorded statements

7.30 We have considered carefully whether we should include in this first group of prior statements of witnesses, statements which are proved to have been accurately recorded on video tape. If a statement made in a precognition on oath or in other proceedings is to be admissible as evidence of the matters stated in it, irrespective of whether it is adopted or repudiated by the witness in court, why should not a statement in a video recording be likewise admissible? If the recording is proved to have been made efficiently and not to have been tampered with, if it is obvious that the witness is the speaker and if what he has to say is intelligible, why should it not be admissible to the same extent as earlier sworn evidence? If such a recording accurately showed the date and time of the statement, would not that be a further consideration in favour of its admissibility?

7.31 Questions as to the evidential status of video recorded statements seem most likely to arise in relation to police interviews of suspects or potential witnesses and in relation to interviews of children. We consider each case separately.

7.32 The video recording of police interviews with suspects has recently been the subject of an exploratory exercise in one Division of Lothian and Borders Police. Some of these recordings have been produced as evidence in court with no apparent difficulties.⁷³ There is not yet, however, any general practice throughout Scotland of video taping police interviews not only with suspects but also with potential witnesses. If there were to be such a practice, governed by official rules or guidelines which were generally accepted as fair, it might well be acceptable that a video recording of an interview which was proved to have been made in accordance with the rules or guidelines should be admissible as evidence of the matters stated by the witness. The rules might be regarded as imposing controls which protected the interests of the witness in much the same way as the judge's supervision when sworn evidence is given.⁷⁴ Further, the video recording might well be an even better record than a transcript of shorthand notes or an audio recording, because it would accurately record not only the questions and answers, pauses, tones of voice and inflections, but also the appearance, demeanour, gestures and facial expressions of the witness. Accordingly it might be of considerable practical value: at present, where no admissible audio or video

⁷² *Muirhead, Petr* 1983 SLT 208.

⁷³ Crown Office and Procurator Fiscal Service Annual Report 1993-94, p 10. The first recording was produced in *HMA v Vaughan* at Edinburgh Sheriff Court: *The Scotsman*, 2 February 1994.

⁷⁴ See para 7.21 above.

recording of an interview is available and the witness challenges the accuracy of the interviewing officer's written note or makes allegations against him, it may be difficult for the jury to be satisfied as to which witness is telling the truth. On the other hand rules or guidelines as to video recording might not exclude effectively any coaching of the witness or any threats made or inducements offered before the recording was made.

7.33 We would acknowledge at once, however, that a very strong case could be made for the admissibility of a statement in such a recording as evidence of the truth of its contents. We do not make any recommendation to that effect in this Report for a number of reasons. First, this Report is concerned only with statements by witnesses and not with statements by the accused.⁷⁵ There does not appear to be any prospect at present of the introduction of a general practice of making video recordings of police interviews with potential witnesses. In the absence of any such practice, we would be making a recommendation which could have no practical result. Even if the video recording of police interviews with potential witnesses were considered to be a development which it would be reasonable for us to anticipate, it seems clear from experience in other jurisdictions⁷⁶ that the training of officers and the definition of the circumstances and conditions in which video recording should take place are complex matters which would have to be considered in the light of research and experience.

7.34 As to video recorded statements by children, we recommended in our *Report on Children's Evidence* that the court should be entitled to authorise the use of a pre-trial deposition procedure whereby a child's evidence could be taken on commission and video-recorded so that the video recording could be played at the trial in place of live evidence by the child.⁷⁷ We made a further recommendation which had the effect that where a child gave evidence, any prior statement which he or she had made in a video recording should be admissible as evidence of the facts stated in it if the child indicated that the statement had been made and its contents were true.⁷⁸ The former recommendation was implemented by sections 33 and 35 of the Prisoners and Criminal Proceedings (Scotland) Act 1993. The effect of the latter recommendation will be included in a wider recommendation in a later paragraph of this Report concerning the adoption by a witness, including a child witness, of a prior statement he or she has made which is contained in a document, including a video recording.⁷⁹ The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 implemented the recommendations in our report concerning the giving of evidence by a child through a live television link,⁸⁰ the criminal jurisdiction of the sheriff court⁸¹ and the definitions of "child" and "court".⁸² The Act includes two provisions which were not derived from our report, one concerning the transfer from one sheriff court to another of a case in which a child's evidence is to be given through a live television link,⁸³ and the other concerning

⁷⁵ See paras 5.71-5.77 above.

⁷⁶ Canada: A Grant, "Videotaping police questioning: a Canadian experiment" [1987] Crim L R 375; *The Audio-Visual Taping of Police Interviews with Suspects and Accused Persons* (Law Reform Commission of Canada, 1988). New Zealand: *Electronic Recording of Police Interviews*, a Report to the Minister of Justice from Sir David Beattie (1988). England and Wales: *Report of the Royal Commission on Criminal Justice* (1993, Cm 2263), chap 2, paras 13-24, chap 3, paras 65-72.

⁷⁷ (1990) Scot Law Com No 125, paras 4.10-4.16, draft Bill, cl 1.

⁷⁸ *Ibid*, paras 4.45-4.66, draft Bill, cl 8.

⁷⁹ See para 7.49 below.

⁸⁰ 1990 Act, s 56, derived from (1990) Scot Law Com No 125, draft Bill, cls 3, 4 and recommendations 12 (paras 4.28-4.33), 15 (paras 4.38-4.42).

⁸¹ 1990 Act, s 60, derived from draft Bill, cl 10 and recommendation 14 (paras 4.35-4.37).

⁸² 1990 Act, s 59, derived from draft Bill, cl 11 and recommendations 13 (para 4.34), 16 (para 4.40).

⁸³ 1990 Act, s 57.

evidence of the prior identification of the accused by a child who gives evidence by that means.⁸⁴

7.35 In England and Wales Part III of the Criminal Justice Act 1991 enacted important reforms in the law as to children's evidence in England and Wales. The Act implemented, with fairly substantial modifications, the recommendations in the Report of the Advisory Group on Video Evidence chaired by Judge Pigot QC⁸⁵ which was published after our *Report on Children's Evidence* had gone to press. Section 54 of the Act inserted in the Criminal Justice Act 1988 a new section 32A regulating the admissibility of a video recording of an interview between an adult and a child witness, including a provision that where such a video-recording is admitted the witness is not to be examined-in-chief on any matter which, in the opinion of the court, has been dealt with adequately⁸⁶ in his recorded testimony. In 1992 the Home Office in conjunction with the Department of Health produced a *Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings*. The use of video recordings in terms of these provisions has proved to be controversial.⁸⁷

7.36 We consider that until sufficient experience is obtained of how all these new provisions as to children's evidence are working in practice, it would not be appropriate for us to make any further proposals on the subject of children's evidence in criminal trials and, in particular, as to video recordings of prior statements by child witnesses. Later in this Report we shall therefore confine ourselves to a repetition of the recommendation we have already mentioned as to the adoption by a witness, including a child witness, of a prior statement in a document, including a video recording.⁸⁸ We envisage that if that recommendation were implemented, the use of video recordings of statements by children might well become a familiar practice in the Scottish criminal courts. It would be a serious further step, however, to provide that a statement made by a child in such a video recording should be admissible as evidence of any matter stated in it, irrespective of whether the statement was adopted by the child.⁸⁹ We think that before such a statement could be regarded as admissible for that purpose, there would have to be clear rules or guidelines as to the circumstances and conditions in which such a recording should be made, in much the same way as we think that video recordings of police interviews should comply with certain rules before they should be admissible as evidence of the matters stated in them. Here again, we consider that the devising of such rules cannot be undertaken at once. It would be necessary for those concerned to have acquired sufficient experience of video recorded children's statements to be able to assess the circumstances in which a statement's evidential value could be assured even if it was not adopted by the child in court.

7.37 Thus far we have considered video recorded police interviews with potential witnesses and video recorded statements by children. We are not aware of any other categories of video recorded statements which might be made under controlled conditions

⁸⁴ 1990 Act, s 58.

⁸⁵ Home Office, 1989.

⁸⁶ The word "adequately" was inserted in s 32A by the Criminal Justice and Public Order Act 1994, s 50.

⁸⁷ eg J R Spencer, "Children's Evidence and the Criminal Justice Bill" (1990) 140 NLJ 1750, "Pigot and Children's Evidence: the Criminal Justice Bill 1990" (1991) 3 Journal of Child Law 34; J Temkin "Doing Justice to Children" (1991) 141 NLJ 315; Spencer and Flin, chap 7.

⁸⁸ See para 7.49 below.

⁸⁹ In *Ferguson v S* 1993 SCLR 712, an appeal under the Social Work (Scotland) Act 1968 to which the Civil Evidence (Scotland) Act 1988 applied, statements made in a video recorded interview with a psychologist by a girl over 14 who did not give evidence were held to be admissible.

and rendered admissible for that purpose. We have concluded that at present statements in video recordings should not be distinguished from statements in other classes of document. Thus in Part V of this Report we recommend that a statement by an unavailable person which is contained in a document, including a video recording, should be admissible as evidence of any matter stated. There the maker of the statement is unavailable and relevant information which is contained only in a document may be better than no information at all provided that, as we have recommended, the reliability of the statement may be attacked and, in particular, evidence may be led as to the credibility of the maker of the statement. In this Part of this Report we are about to recommend that a witness's prior statement which is contained in a document, including a video recording, should be admissible as evidence of any matter stated in it only if the witness accepts that he made the statement and adopts it as his evidence. Here these conditions are attached for the following reasons. We consider that it would be unwise to make admissible as evidence of its truth an alleged prior statement which a witness repudiated.⁹⁰ The sounder policy, we believe, is to allow a prior statement to be used to supplement, rather than to contradict, the witness's oral evidence in court. The witness will be available to give such evidence as he can from his existing recollection and to say whether he made the statement or not, and both he and, probably, another witness or witnesses will be able to explain the circumstances in which the statement was embodied in the document.

7.38 It may be argued against our requirement of adoption of the prior statement by the witness that it raises the prospect of a witness, shown a perfectly clear video recording of a prior statement, refusing to admit that he had made that statement. We think it is more likely, however, that a dishonest witness, embarrassed by such a recording, would not risk being in contempt through prevarication but would admit that he had made the statement subject to an explanation that it was untrue and that he had been influenced to make it for some reason such as the making of threats or the offering of inducements.

Adopted statements in documents

7.39 The first group of prior statements which we recommend should be admissible as evidence of the facts stated consists of statements in precognitions on oath or in prior proceedings.⁹¹ The second group consists of statements contained in documents. Such a statement would be admissible where the witness stated in court that he had made the statement and that he now adopts it as his evidence. This recommendation is intended to assist a witness who has given an honest account of events on a previous occasion but finds it difficult to give evidence in court, whether through the dimming of his recollection or through emotional stress.⁹²

7.40 The present law as to how far a witness may refer to a document in the witness box in order to help him to give his evidence may be briefly stated as follows. As a general rule a witness other than an expert witness must give evidence from his own recollection at the time of his examination in the witness box. He may, however, refer to certain documents for the purpose of refreshing his memory. Such documents are normally writings made at or soon after the event in question in circumstances which satisfy the court that the event was fresh in his memory at the time. Examples of such documents include notes, memoranda,

⁹⁰ Other than a statement made in a precognition on oath or in prior proceedings: see paras 7.18, 7.19, 7.21-7.29 above.

⁹¹ See paras 7.21-7.29 above.

⁹² See para 7.15 above.

diaries and business books. The document may have been written by the witness himself, or by another person if the witness saw that person writing the document and shortly thereafter verified its terms.⁹³ There is old authority for the view that where the witness has no recollection whatever of a matter, so that his memory cannot be refreshed or stimulated by a document, he may refer to an accurate contemporaneous record of the matter provided that, in solemn procedure, it has been lodged as a production. It may be, however, that he must have made the record himself.⁹⁴

7.41 The rule recently laid down by the High Court in *Jamieson v HM Advocate (No 2)*,⁹⁵ to which we have already referred, assists a witness who has made a prior statement concerning a matter about which he is required to give evidence. If at the trial he is unable to give evidence about the subject-matter of the statement but is able to say that what he then said was the truth, he thereby incorporates the statement into his testimony, and evidence of what he then said may be led. We consider this to be a most welcome development of the law. Prior to *Jamieson* the law did not assist a witness where he had made a statement shortly after the event to a person who had recorded it but the witness had not verified the accuracy of the record. Nor did it assist him where he had made a recorded statement at a date much closer to the date of the offence than the date of the trial but not so close that the court would permit him to use it to refresh his memory.⁹⁶ Thus, if he had made a statement to a police officer shortly after an incident and the officer had noted it in his notebook but the witness had not checked it, he could not refer to what the officer noted in order to refresh his memory at the trial. Nor could he refer to a statement which he gave to the police a few weeks after an incident but several months before the trial. The fact that the statement was not a precognition was immaterial. Nor did it matter whether it was recorded in writing, or in an audio or video recording, even if it could be proved that the recording had been correctly made and no-one had tampered with it. Nor did it avail the witness to say that he made the statement honestly, or that he accepted that it recorded his honest recollection at the time. He was required to give his evidence without any help from the statement, even if he had forgotten important details of the event, or even if the statement contained grossly indecent or embarrassing details which he (or more usually she) would have the greatest difficulty in speaking about in court.

7.42 In our view this was plainly unsatisfactory. The giving of evidence should not be a test of memory, and still less should it be a cause of acute emotional distress, if that can be prevented by rational means. It is equally important that where a witness cannot give evidence for such reasons, the jury should not be denied access to an account of what the witness would agree that he said on a previous occasion. In our *Report on Children's Evidence* we recommended that a witness's prior statement should be admissible as evidence of the facts stated in it provided that certain conditions were satisfied. These were that the statement should not be in the form of a precognition; that it should be in written form and signed by the witness, or in the form of an audio or video recording, or in some other permanent form from which it could reasonably be inferred that it accurately and completely recorded what was said by the witness on the previous occasion; and that the

⁹³ Dickson, paras 1775-1785; Walker and Walker, para 341(b); Lewis, p 229.

⁹⁴ *McPherson* (1845) 2 Broun 450. An expert witness may incorporate in his evidence the terms of his report, which may contain facts which he does not remember: *A Alison, Practice of the Criminal Law in Scotland* (1833), p 541.

⁹⁵ 1994 SCCR 610; see para 7.8 above.

⁹⁶ *A Alison, Practice of the Criminal Law in Scotland* (1833), pp 540-541; Dickson, para 1778.

witness should indicate in court that he made the statement and its contents are true.⁹⁷ Having had an opportunity to reconsider the matter, we adhere to the view that precognitions should be excluded,⁹⁸ but we now put forward in this Report a slightly modified version of the latter parts of that recommendation.

7.43 We do not seek to modify in any way the ratio of *Jamieson*.⁹⁹ As we have already indicated, we intend that in the event of the implementation of our recommendations in this Report any evidence which is admissible under the present law should continue to be admissible.¹⁰⁰ All that we propose to do here is to encourage resort to the principle of *Jamieson* when a witness's prior statement is contained in a document. We consider that it would be helpful to make it clear that a witness's prior statement will be admissible as evidence of the matters stated in it if certain conditions are satisfied. Like a statement which is admissible by virtue of any of the exceptions to the hearsay rule discussed in Part V, it will be admissible as evidence of the matters stated in it only if the witness's direct oral evidence of these matters would be admissible.¹⁰¹ We propose three further conditions.

7.44 We propose, as the first condition, that the prior statement should be "contained in a document", as that expression is defined in clause 3(3) of our draft Bill.¹⁰² The definition of "document" in clause 3(4) includes a document in writing, an audio recording and a video recording.¹⁰³ We do not consider it to be necessary that a statement in writing should have been signed by the witness. In practice, a statement recorded in a police officer's notebook is seldom signed by the witness.¹⁰⁴ Further, the fact that the witness signed the statement would be an unnecessary guarantee of its authenticity if, as we propose, the witness is required to confirm in court that he made the statement. We comment on the use of audio and video recordings in later paragraphs.¹⁰⁵

7.45 We do not propose to adopt the requirement in the *Report on Children's Evidence* that the statement should be in some permanent form from which it can reasonably be inferred that it accurately and completely records what was said by the witness on the previous occasion. In our view such a requirement is unnecessary. No such requirement is imposed in clause 1 in relation to a statement made by a person whose evidence is unavailable where the statement is contained in a document. We have observed that evidence of the circumstances in which such a document was compiled would be admissible at the trial and would go to the weight to be attached to it.¹⁰⁶ The same observation appears to us to be applicable where the maker of the statement is available in court and is prepared to adopt it as his evidence. Not only will another witness usually speak to the provenance of the document: the maker of the statement will often be able to speak to the circumstances in which his statement was recorded, even if through the dimming of recollection he cannot vouch the accuracy of the contents of the document. The nature of the document and the circumstances in which the statement was embodied in it will be matters of evidence from

⁹⁷ *Report on Children's Evidence*, para 4.66, recommendation 18, draft Bill, cl 8.

⁹⁸ See our proposed definition of "statement": paras 5.4, 5.20 above.

⁹⁹ 1994 SCCR 610; see para 7.8 above.

¹⁰⁰ See para 5.3 above.

¹⁰¹ See paras 5.25, 5.28 above and para 7.58 below.

¹⁰² See paras 5.16-5.20 above.

¹⁰³ See paras 5.14, 5.20 above.

¹⁰⁴ See, however, the second footnote to para 7.45 below.

¹⁰⁵ See paras 7.50-7.53 below.

¹⁰⁶ See para 5.19 above.

which the jury will be able to draw an inference about the weight which should be attached to the statement.¹⁰⁷

7.46 In any event we now consider that certain of the requirements in the recommendation in the *Report on Children's Evidence* were unduly stringent. A requirement that the statement should be in a "permanent form" might be understood to exclude statements in a form which would have been destroyed in the normal course of events.¹⁰⁸ Again, a requirement that the record of the statement should be absolutely accurate and complete would impose an impracticably high standard even in the context of evidence in criminal cases, where the law imposes exacting standards in the proof of guilt. The witness's statement in the policeman's notebook is not usually a verbatim record of exactly what was said: the statement is usually elicited, at least in part, by questions put to the witness by the officer, and what the witness says may be to some extent repetitive or irrelevant. The officer, however, writes down the substance of what the witness has to say, excluding any questions of his own and any repetitious or irrelevant matter. We do not think that such a statement, conscientiously taken by a responsible officer from an honest witness, should be excluded because it does not "accurately and completely" record everything the witness said. If, contrary to our view, it was considered necessary to include some requirement similar to that in the *Report on Children's Evidence*, we would suggest that it would be sufficient to say that the nature of the document and the circumstances in which it was created should be such that it might reasonably be inferred therefrom that it contains a substantially complete and accurate record of what the witness said.

7.47 Our first recommended condition was that the statement should be contained in a document.¹⁰⁹ The second is that the witness must acknowledge that he made the statement and must adopt it as his evidence. This condition is intended to reflect the principle in *Jamieson*.¹¹⁰ In clause 2(2)(b) of the draft Bill we use the words "the witness, in the course of giving evidence, indicates that the statement was made by him and that he adopts it as his evidence". We do not think it should be necessary, however, for him to indicate that the particular contents of the statement are true. If he were able to confirm that the whole of its contents were true, that would be most satisfactory. But a witness who had forgotten some of the facts recorded in the statement would be unable to swear that these facts were true. All that he could say would be that when he gave the statement he was telling the truth and that he accepts, or has no reason to doubt, that the statement in the document is a record of what he said.¹¹¹ It seems to us to be only sensible that a witness in that position should be entitled to adopt the statement as his evidence, that is, to say in effect that he incorporates the contents of the statement in his evidence. If he remembers some of the matters recorded and can give an account of them in court but has forgotten others, he should be entitled to adopt the part, or parts, of the statement containing the matters which he has forgotten.¹¹² The opportunity for effective cross-examination might be somewhat reduced where there were certain matters which the witness could not remember, but he might nevertheless be cross-examined on the matters he did remember, on the circumstances in which he

¹⁰⁷ For example, where the statement has been recorded or noted on paper, and the witness has confirmed its contents by reading and signing it, or by indicating his approval of its terms when it was read back to him, the jury might draw the inference that the statement had been accurately recorded.

¹⁰⁸ Cf *R v Jones* [1978] 1 WLR 195 at p 199, [1978] 2 All ER 718 at p 721.

¹⁰⁹ See para 7.44 above.

¹¹⁰ 1994 SCCR 610; see para 7.8 above.

¹¹¹ This appears to have been the position of the witness in *Jamieson v HM Advocate (No 2)* 1994 SCCR 610 at p 611.

¹¹² In the draft Bill, cl 3(1)(b), the definition of "statement" includes "any part of a statement".

witnessed all the events mentioned in the statement and, where the cross-examiner has appropriate information, on his credibility and reliability.

7.48 Our final condition is that the maker of the statement should have been a competent witness at the time when he made the statement. We have already recommended such a condition in relation to a statement by a person whose evidence is unavailable.¹¹³ It is possible that a complainant in a trial for an offence involving child sexual abuse might be asked to adopt a statement he or she made when a child. In such a case it is necessary that his or her competence at the date when the statement was made should be established.

7.49 We now restate our recommendations concerning the admissibility of the prior statements of witnesses. We **recommend**:

18. (1) **This recommendation applies to any prior statement made by a witness who gives evidence in criminal proceedings which is not admissible as evidence of any matter stated in it under the present law, other than a statement mentioned in recommendation 16 or 17 above.**
- (2) **Any such prior statement should be admissible as evidence of any matter stated in it of which direct oral evidence by the witness would be admissible if given in the course of the proceedings, provided that each of the following conditions is satisfied -**
 - (a) **the statement is contained in a document;**
 - (b) **the witness, in the course of giving evidence, indicates that the statement was made by him and that he adopts it as his evidence; and**
 - (c) **the witness would have been a competent witness at the time the statement was made.**

(Draft Bill, clause 2(2), (3))

The use in court of adopted statements in documents

7.50 In the following paragraphs we discuss several issues regarding the use in court of a witness's prior statement which is tendered on the ground that it satisfies the conditions in the foregoing recommendation.

Adoption of a video recorded statement

7.51 In our *Report on Children's Evidence* we recommended that where a video recording of a statement was to be used as evidence, a transcript of the contents of the recording should be prepared and, if possible, agreed by all parties before the trial.¹¹⁴ We now suggest, without making any formal recommendation, that before the recording is played, the witness should be examined as to what he is recorded as having said in the transcript. The words attributed to him in the transcript should be put to him accurately and in order,

¹¹³ See paras 5.27-5.28, recommendation 4(2) above.

¹¹⁴ *Report on Children's Evidence*, paras 5.11-5.12, recommendation 21. See para 7.54 below.

sentence by sentence or phrase by phrase as appropriate, and he should be asked, at every stage, whether he uttered the sentence or phrase attributed to him. He should also be asked whether it is true or, if he is unable to say whether it is true or not, whether he was telling the truth when he made the statement. Any part of the statement which he denies having made, or which he is not prepared to adopt, will be inadmissible, and should be omitted when the recording is played.¹¹⁵

7.52 That method of putting the statement to the witness would be similar to the method used when an alleged prior inconsistent statement is put to a witness. It would be no more prejudicial to the accused than that procedure, because just as the jury would be directed not to accept the contents of the prior inconsistent statement as evidence of their truth, so also would they be directed not to accept any statement in the recording or transcript which the witness was not prepared to adopt. Indeed it seems unlikely that the case would go to the jury at all if the witness was an essential witness to a crucial or material fact and he failed to acknowledge the truth of the critical part or parts of the prior statement. The procedure we have suggested should not be regarded as the only way of proceeding where a witness has made a video-recorded statement. Other satisfactory techniques might well be found. The suggested procedure would almost certainly be less prejudicial than the playing of the video recording to the jury without such prior questioning, since the jury would be more likely to remember and be impressed by a video recording than by questions to the witness in court which contained parts of the statement.

Procedure where part of a recorded statement is inadmissible

7.53 If any part of an audio or video recording is inadmissible, that should not normally justify the judge in excluding from the jury's consideration the remainder of the recording. That would appear to follow from the dicta in *Lord Advocate's Reference (No 1 of 1983)*,¹¹⁶ and *Tunncliffe v HM Advocate*,¹¹⁷ cases concerning the admissibility of transcripts of tape-recorded interviews of suspects by the police. It seems to us, accordingly, that it would not be improper to place before the jury a tape or transcript which had been edited to exclude inadmissible matter, either by agreement with the other side before the trial, or after an objection had been sustained by the court. We consider that in any event a party intending to adduce an audio or video recording would wish to agree the terms of a transcript before the trial. In *Tunncliffe* the Court observed that if the Crown intends to lodge and may have to rely upon the tape recording of an interview which contains material which may have to be excluded on the ground of unfairness it should provide the machinery and make all the necessary preparations so that an edited version of the recording can be played.¹¹⁸

Shorthand record and transcript of a video recorded statement

7.54 We repeat here a recommendation in our *Report on Children's Evidence* as to the function of the court shorthand writer and the use of a transcript where a video recording is used as evidence.¹¹⁹ We regarded these as matters of practice which did not require to be regulated by legislation. We pointed out that it might be impracticable for the shorthand

¹¹⁵ See para 7.53 below.

¹¹⁶ 1984 JC 52 at p 59, 1984 SLT 337 at p 341, 1984 SCCR 62 at p 70.

¹¹⁷ 1991 SCCR 623.

¹¹⁸ 1991 SCCR 623 at p 627.

¹¹⁹ *Report on Children's Evidence*, paras 5.11-5.12, recommendation 21.

writer to take down what was being said on the video recording while it was being played in court, but that a transcript might be required in the event of an appeal. We also considered that before the trial a transcript should be prepared and, if possible, agreed by all parties. We proposed that both the video recording and the transcript should be available to the Appeal Court. We adhere to these views and therefore **recommend**:

- 19. Where evidence is presented in court in the form of a video recording, it should not be necessary for the court shorthand writer to record what is said on that recording; but a separate transcript of the contents of the recording should be made and, if possible, agreed as accurate by all parties in the proceedings. In the event of an appeal, both the transcript and the video recording should be available for use by the Appeal Court.**

Prior statements improperly obtained

7.55 The next matter we wish to mention is the taking of objections to the admissibility of a document (including, of course, an audio or video recording) which contains a prior statement, or to the admissibility of the contents of the statement or any part of it. In the Discussion Paper we proposed that it should be competent for objection to be taken to the admission of a prior statement of a witness on the ground that it had been obtained illegally, and that the court should consider the objection and make a determination as it would have done had the admission of real evidence (that is, any article other than a written or printed document) been objected to on those grounds.¹²⁰ The majority of those who submitted comments agreed with this proposition, but we agree with those who considered that legislation was unnecessary since the common law already provided an adequate safeguard against the admission of evidence illegally or irregularly obtained. At common law, evidence which has been so obtained will be admissible if the court holds that the irregularity ought to be excused; and the question whether it ought to be excused depends upon the nature of the irregularity and the circumstances in which it was committed. In determining that question the principle of fairness to the accused is an appropriate consideration.¹²¹ It appears to us that the admissibility of a document or statement which had been improperly obtained should be considered by the court in accordance with the familiar principles applicable where any other item of evidence has been so obtained, and that a statutory provision on the matter would be superfluous.

Prior statements elicited by leading questions

7.56 Consistently with the view just expressed, we do not consider that there should be any statutory rules as to the admissibility of a prior statement elicited in response to a question which was leading or otherwise of a character to which objection might have been taken if it had been put to the witness in the course of a trial. In our *Report on Children's Evidence* we recommended that a prior statement should not be inadmissible solely because it had been so elicited.¹²² After that report went to press, however, we had the advantage of considering the Report of the Advisory Group on Video Evidence (the Pigot Report) which

¹²⁰ DP, paras 4.18-4.20. The proposition was stated to be without prejudice to the law as to the admissibility of confessions.

¹²¹ *Laurie v Muir* 1950 JC 19, 1950 SLT 37; 10 *Stair Memorial Encyclopaedia* paras 692-700.

¹²² *Report on Children's Evidence*, paras 4.68-4.70, recommendation 19, draft Bill, cl 8(4).

had this to say regarding its proposal (which we do not adopt) that a video-recorded interview should take the place of the witness's examination-in-chief:¹²³

"Because it is proposed that video-recorded interviews should replace the examination-in-chief of witnesses in court they ought to be conducted as far as possible in accordance with the rules which govern that procedure. This means that when issues are addressed which relate to the commission of an offence the interviewer should avoid asking questions which suggest the answer and should not assume that facts are established which are likely to be in dispute. Where children are concerned the courts already allow some latitude in this area depending upon the child's age and understanding. We think the important point is that interviewers should never be the first to suggest that a particular offence was committed or that a particular person was the perpetrator. We do not believe that the courts will exclude fairly-conducted interviews for purely technical reasons or because of the inclusion of occasional insignificant leading questions. Nevertheless it should be remembered that crucial leading questions which relate to the central facts of a case must be avoided wherever possible. They may well result in the exclusion of the interview at court."

7.57 We have also noted that a distinction has been drawn between a clinical diagnosis of a child and a forensic diagnosis. In the former, it may be proper to ask leading questions repeatedly in order to discover whether the child is telling the truth or is simply answering the questions in the way that he or she hopes the questioner wants him or her to answer.¹²⁴ In an interview recorded for the purposes of legal proceedings, on the other hand, such questioning would be clearly objectionable. Recent research shows that children are considerably more likely than adults to produce inaccurate information in response to leading questions.¹²⁵ It is impossible to prevent attempts being made to influence the witness by the making of suggestions in private before the statement is recorded.¹²⁶ That, however, is no reason for making special provision for the admissibility of leading questions at the recording. It is possible to envisage the conviction of an accused on two or more charges each alleging an offence against a child, so connected in time, character and circumstances that the evidence of one child in relation to one charge was corroborated by the evidence of another child in relation to another,¹²⁷ the incriminating evidence of each child having been elicited by leading questions in the course of a video recording. The risk of a miscarriage of justice in such circumstances requires no emphasis.

7.58 We therefore think that it would be inappropriate to make any special provision as to the nature of the questions which elicited the statement. That the ordinary rules would apply is made clear by the provision in clause 2(1) of our draft Bill that any prior statement made by the witness shall be admissible as evidence of any fact or opinion stated in it "of which direct oral evidence by him would be admissible if given in the course of those proceedings".¹²⁸ We think that that plainly shows that if direct oral evidence of the fact or opinion would be inadmissible if given in court, an objection may be validly taken and sustained, whether on the ground that an improperly leading question has been asked,¹²⁹ or

¹²³ Pigot Report (Home Office, 1989), para 4.20.

¹²⁴ *Eg*, HL Deb vol 489, col 284 *per* Lord Hutchinson of Lullington.

¹²⁵ D Glaser and J R Spencer, "Sentencing, children's evidence and children's trauma" [1990] Crim L R 371 at p 378.

¹²⁶ J McEwan, "In the box or on the box? The Pigot Report and child witnesses" [1990] Crim L R 363 at p 365, n 21.

¹²⁷ *Moorov v HMA* 1930 JC 68, 1930 SLT 596.

¹²⁸ See paras 5.25-5.26, 7.43, 7.49 above.

¹²⁹ By no means all leading questions are objectionable: 10 *Stair Memorial Encyclopaedia* para 552.

that the evidence is irrelevant or discloses the accused's previous convictions, or on any other legitimate ground.

The European Convention on Human Rights

7.59 We consider that the recommendations we have made in this Part of this Report do not contravene article 6(1) and 3(d) of the European Convention on Human Rights.¹³⁰ Article 6(1) secures the accused's right to a fair trial, while article 6(3)(d) confers on him the right to examine or have examined the witnesses against him. If a witness's prior statement is admitted as evidence of the truth of its contents, the witness himself will be present in court and available for cross-examination.

7.60 Our recommendation that a witness's prior statement made in a precognition on oath or in prior proceedings should be admissible as evidence of the truth of its contents whether the witness adopts it or not¹³¹ appears to be consistent with the decision of the European Commission of Human Rights in *X v Federal Republic of Germany*.¹³² There, the court relied on statements that two witnesses had made to the police. At the trial the statements were read out, the witnesses were called and they denied that the statements were true. The defence had every opportunity to put questions to them. The Commission concluded that the requirements of article 6(3)(d) were fully met as regards these witnesses. The Commission also held that the court had not violated the guarantee of a fair trial in article 6(1) by relying on the original statements "as long as the use of such evidence is not in the circumstances unfair". It found that there was no unfairness because, amongst other reasons, the witnesses were heard at the trial; the statements were not the only evidence against the accused; and the court had carefully considered the issue of the two witnesses' credibility. It accordingly appears that there would be no violation of article 6(1) and (3)(d) if the court accepted a witness's prior statement as evidence of the truth of its contents, even where the witness contradicted the statement on oath, provided that the witness appeared in court and the accused had an opportunity to cross-examine him.

7.61 Our recommendation that a witness's prior statement should be admissible as evidence of the truth of its contents if it is contained in a document and the witness agrees that he made it and adopts it as his evidence¹³³ appears to be consistent with the Commission's decision in *Hauschildt v Denmark*.¹³⁴ There the Commission held that there had been no violation of the Convention where at the Court of Appeal a witness's earlier statement in the City Court was read out. The witness was asked whether he could stand by his statement, and the defence were given an opportunity of putting further questions to the witness in order to obtain further evidence or to question the correctness of his evidence. The Commission found that this procedure was not of such a character that it could render the hearing unfair.

¹³⁰ See para 4.4 above.

¹³¹ See paras 7.21-7.29 above.

¹³² No 8414/78; D & R 17 (1980) p 231.

¹³³ See paras 7.39-7.49 above.

¹³⁴ No 10486/83, Appendix II.

Judicial discretion

7.62 It is appropriate to state as our final substantive recommendation in this Report our conclusion in Part IV that any legislation implementing our recommendations should not confer on the court a discretion to exclude evidence which our recommendations would make admissible.¹³⁵ We accordingly **recommend**:

20. **There should be no statutory discretion to exclude evidence rendered admissible in terms of the recommendations in this Report.**

Transitional provisions

7.63 If our recommendations are implemented, it would be clearly unreasonable for them to be made applicable to proceedings which had been commenced before the legislation came into force, because that might disrupt arrangements already made for the leading of evidence in these proceedings. Solemn proceedings for this purpose should be taken to have been commenced when the indictment was served.¹³⁶ There are similar provisions in paragraph 7(1)(c) of Schedule 3 to the Prisoners and Criminal Proceedings (Scotland) Act 1993. We therefore **recommend**:

21. (1) **Our recommendations should not apply to**
 - (a) **proceedings commenced; or**
 - (b) **where the proceedings consist of an application to the sheriff by virtue of section 42(2)(c) of the Social Work (Scotland) Act 1968, an application made, before the legislation implementing these recommendations comes into force.**
- (2) **For the purposes of this recommendation solemn proceedings are commenced when the indictment is served.**

(Draft Bill, clause 4(3))

¹³⁵ See paras 4.33-4.46 above.

¹³⁶ On the commencement of summary proceedings see *Lees v Lovell* 1992 SCCR 557.

Part VIII Summary of Recommendations

EXCEPTIONS FOR STATEMENTS BY PERSONS WHOSE EVIDENCE IS NOT AVAILABLE

1. Nothing in the statutory provisions enacting the recommendations in this Report should prejudice the admissibility of any evidence that would be admissible apart from these provisions.

(Paragraphs 5.1-5.3. Draft Bill, clause 3(5))

Definitions

2. The following definitions should be adopted:
 - (a) "statement" should include -
 - (i) any representation, however made or expressed, of fact or opinion, and
 - (ii) any part of a statement,but should not include a statement in a precognition other than a precognition on oath;
 - (b) "document" and "film" should be defined as in paragraph 8 of Schedule 3 to the Prisoners and Criminal Proceedings (Scotland) Act 1993;
 - (c) a "statement contained in a document" should be a statement the maker of which -
 - (i) makes the statement in a document personally,
 - (ii) approves a document as embodying the statement, or
 - (iii) makes a statement which is embodied in a document with or without his knowledge, by whatever means or by any person.

(Paragraphs 5.4-5.19. Draft Bill, clause 3(1), (2), (3), (4))

Evidence of the statement

3. Any statement admissible by virtue of any of the exceptions to the hearsay rule recommended in this Part either -
 - (a) must be contained in a document; or

- (b) if made otherwise than in a document, must be the subject of oral evidence in court by a witness who had direct personal knowledge of the making of the statement.

(Paragraphs 5.21-5.23. Draft Bill, clause 1(2))

Extent to which the statement should be admissible

- 4. (1) A statement falling within any of the exceptions to the hearsay rule recommended in this Part should be admissible as evidence of any matter stated in it of which direct oral evidence by the maker of the statement would be admissible if given in the course of the proceedings.
- (2) The statement should not be admissible unless the maker of the statement would have been a competent witness at the time the statement was made.

(Paragraphs 5.25-5.27. Draft Bill, clause 1(1), (3))

The exceptions

Death

- 5. Subject to the other recommendations in this Part of this Report, statements by deceased persons should be admissible.

(Paragraphs 5.34-5.35. Draft Bill, clause 1(1)(a))

Illness

- 6. Subject to the other recommendations in this Part of this Report, a statement should be admissible if the person who made it is unfit to give evidence in any competent manner by reason of his bodily or mental condition.

(Paragraphs 5.36-5.38. Draft Bill, clause 1(1)(a))

Absence abroad

- 7. Subject to the other recommendations in this Part of this Report, a statement should be admissible if -
 - (a) the person who made it is sufficiently identified,
 - (b) he is outwith the UK, the Channel Islands and the Isle of Man, and
 - (c) it is not reasonably practicable -
 - (i) to secure his attendance at the trial or
 - (ii) to obtain his evidence in any other competent manner.

(Paragraphs 5.40-5.46. Draft Bill, clause 1(1)(b))

Disappearance

8. Subject to the other recommendations in this Part of this Report, a statement should be admissible if -
- (a) the person who made it is sufficiently identified,
 - (b) all reasonable steps have been taken to find him and
 - (c) he cannot be found.

(Paragraphs 5.48-5.52. Draft Bill, clause 1(1)(c))

Refusal to be sworn or to give evidence; privilege against self-incrimination

9. Subject to the other recommendations in this Part of this Report, a statement should be admissible if the person who made it is called as a witness and -
- (a) refuses to take the oath or affirmation or, if a child, to accept an admonition to tell the truth; or
 - (b) having been sworn or admonished and directed by the judge to give evidence in connection with the subject-matter of the statement, refuses to do so; or
 - (c) having been sworn or admonished, is allowed by the judge to refuse to give such evidence on the ground that it might incriminate him.

(Paragraphs 5.54-5.61. Draft Bill, clause 1(1)(d), (e), (10))

Unavailability caused by the party tendering the statement

10. None of the statements specified in recommendations 5 to 9 above should be admissible if the circumstances mentioned in the relevant recommendation have been brought about by or on behalf of the party tendering the statement for the purpose of preventing the maker of the statement from giving evidence.

(Paragraph 5.63. Draft Bill, clause 1(4))

Statements by accused persons

11. The recommendations in this Report should not apply to a statement made by a person who is an accused in the trial at the time when evidence of the statement is tendered.

(Paragraphs 5.71-5.76. Draft Bill, clause 3(6))

THE NEW EXCEPTIONS IN PRACTICE

Application to admit statement

12. (1) A party who wishes to adduce evidence of a statement by virtue of any of recommendations 5 to 8 above should be entitled to apply for the admission of the statement -

- (a) in a High Court trial, by giving notice to the Court and the other parties, which should be treated as notice of a matter in respect of which the Court is required to order a preliminary diet;
 - (b) in a sheriff and jury trial, by giving notice to the court and the other parties before the first diet;
 - (c) in summary proceedings, at the intermediate diet.
- (2) Where a party wishes to adduce evidence of a statement by virtue of recommendation 9 above, or where the court is satisfied that there has been good reason for a party not complying with paragraph (1) above, the party should be entitled to apply for the admission of the statement at the trial diet.

(Paragraphs 6.3-6.5, 6.7-6.8. Draft Bill, clause 1(8), (9))

13. The notices referred to in recommendation 12(1) and ancillary procedures should be such as may be prescribed by Act of Adjournal.

(Paragraph 6.6.)

Proof of conditions of admissibility

14. Where a statement is admissible by virtue of any of recommendations 5 to 9 above, the following evidence relative to the maker of the statement should be admissible:
- (a) evidence which would have been admissible as relevant to his credibility if he had given evidence in connection with the subject-matter of the statement;
 - (b) evidence which, if he had been cross-examined as to credibility, would have been inadmissible as being in contradiction of his answers; and
 - (c) evidence (to show only that he has contradicted himself) which proves that he has made, before or after making the statement and whether orally or otherwise, a statement which is inconsistent with it.

(Paragraphs 6.10-6.20. Draft Bill, clause 1(5))

Additional evidence

15. Where a party has led evidence under the previous recommendation, the judge should be entitled to permit either party to lead additional evidence of such description as the judge may specify.

(Paragraphs 6.21-6.22. Draft Bill, clause 1(6), (7))

PRIOR STATEMENTS OF WITNESSES

Precognitions on oath

16. Where a witness has made a statement in a precognition on oath that statement should be admissible as evidence of any matter stated in it of which direct oral evidence by him would be admissible if given in the course of the proceedings.

(Paragraph 7.23. Draft Bill, clause 2(1), (4)(a))

Statements in prior proceedings

17. Where a witness has made a statement in other proceedings, whether criminal or civil, and whether taking place in the United Kingdom or elsewhere, that statement should be admissible as evidence of any matter stated in it of which direct oral evidence by him would be admissible if given in the course of the proceedings.

(Paragraphs 7.25-7.28. Draft Bill, clause 2(1), (4)(b))

Adopted statements in documents

18. (1) This recommendation applies to any prior statement made by a witness who gives evidence in criminal proceedings which is not admissible as evidence of any matter stated in it under the present law, other than a statement mentioned in recommendation 16 or 17 above.
- (2) Any such prior statement should be admissible as evidence of any matter stated in it of which direct oral evidence by the witness would be admissible if given in the course of the proceedings, provided that each of the following conditions is satisfied -
- (a) the statement is contained in a document;
 - (b) the witness, in the course of giving evidence, indicates that the statement was made by him and that he adopts it as his evidence; and
 - (c) the witness would have been a competent witness at the time the statement was made.

(Paragraphs 7.39-7.48. Draft Bill, clause 2(2), (3))

The use in court of adopted statements in documents

19. Where evidence is presented in court in the form of a video recording, it should not be necessary for the court shorthand writer to record what is said on that recording; but a separate transcript of the contents of the recording should be made and, if possible, agreed as accurate by all parties in the proceedings. In the event of an appeal, both the transcript and the video recording should be available for use by the Appeal Court.

(Paragraphs 7.51-7.54.)

Judicial discretion

20. There should be no statutory discretion to exclude evidence rendered admissible in terms of the recommendations in this Report.

(Paragraph 7.62.)

Transitional provisions

21. (1) Our recommendations should not apply to
- (a) proceedings commenced; or
 - (b) where the proceedings consist of an application to the sheriff by virtue of section 42(2)(c) of the Social Work (Scotland) Act 1968, an application made,
- before the legislation implementing these recommendations comes into force.
- (2) For the purposes of this recommendation solemn proceedings are commenced when the indictment is served.

(Paragraph 7.63. Draft Bill, clause 4(3))

Appendix A

CRIMINAL EVIDENCE (SCOTLAND)

BILL

ARRANGEMENT OF CLAUSES

Clause

1. Exceptions to rule that hearsay evidence is inadmissible.
2. Admissibility of prior statements of witnesses.
3. Construction.
4. Citation, commencement, transitional provision and extent.

DRAFT

OF A

BILL

TO

A.D. 1994 Make provision in relation to criminal proceedings in Scotland regarding the admissibility of hearsay evidence and the prior statements of witnesses; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

Exceptions to the rule that hearsay evidence is inadmissible

1.-(1) Subject to the following provisions of this section, a statement made by a person shall be admissible in criminal proceedings (being a statement made otherwise than while giving oral evidence in court of those proceedings) as evidence of any matter stated in it of which direct oral evidence by him would be admissible if given in the course of the proceedings where the person who made the statement-

(a) is dead or by reason of his bodily or mental condition is unfit to give evidence in any competent manner;

(b) is sufficiently identified, but is outwith the United Kingdom, the Channel Islands and the Isle of Man and it is not reasonably practicable to secure his attendance at the trial or to obtain his evidence in any other competent manner;

(c) is sufficiently identified, but cannot be found and all reasonable steps have been taken to find him;

(d) having been authorised to do so by virtue of a ruling of the court in the proceedings that he is entitled to refuse to give evidence in connection with the subject matter of the statement on the grounds that such evidence might incriminate him, refuses to give such evidence; or

(e) is called as a witness and either-

(i) refuses to take the oath or affirmation; or

(ii) having been sworn as a witness and directed by the judge to give evidence in connection with the subject matter of the statement refuses to do so.

(2) A statement shall be admissible under subsection (1) above if the statement-

(a) is contained in a document; or

(b) was made otherwise than in a document and a person who has direct personal knowledge of the making of the statement gives oral evidence thereof in the proceedings.

(3) A statement shall not be admissible as evidence by virtue of this section unless, at the time the statement

was made, the person who made it would have been a competent witness in proceedings such as are mentioned in subsection (1) above.

(4) A statement shall not be admissible as evidence by virtue of this section where the occurrence of any of the circumstances mentioned in paragraphs (a) to (e) of subsection (1) above, by virtue of which the statement would otherwise be admissible, is caused by-

(a) the person in support of whose case the evidence would be given; or

(b) any other person acting on his behalf,

for the purposes of securing that the person who made the statement does not give evidence for the purposes of the proceedings either at all or in connection with the subject matter of the statement.

(5) Where in any proceedings a statement made by any person is admitted as evidence by virtue of any of paragraphs (a) to (c) and (e)(I) of subsection (1) above-

(a) any evidence which, if that person had given evidence in connection with the subject matter of the statement, would have been admissible as relevant to his credibility as a witness shall be admissible for that purpose in those proceedings;

(b) evidence may be given of any matter which, if that person had given evidence in connection with the subject matter of the statement, could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examining party; and

(c) evidence tending to prove that that person, whether before or after making the statement, made in whatever manner some other statement which is inconsistent with it shall be admissible for the purpose of showing that he has contradicted himself.

(6) Where a statement has been admitted by virtue of this section and evidence is admitted by virtue of subsection (5) above-

(a) in solemn proceedings, the judge may, without

prejudice to sections 149 and 149A of the Criminal Procedure (Scotland) Act 1975 (in this section referred to as "the 1975 Act") (additional evidence and evidence in replication), on the motion of the prosecutor or the defence at any time before the commencement of the speeches to the jury; or

(b) in summary proceedings, the judge may, without prejudice to sections 350 and 350A of the 1975 Act, on the motion of the prosecutor or the defence before the prosecutor proceeds to address the judge on the evidence,

permit the prosecutor or, as the case may be, the defence to lead additional evidence of such description as the judge may specify.

(7) For the purposes of-

(a) paragraph (a) of subsection (6) above, subsections (2) and (3) of section 149 of the 1975 Act shall apply as they do in relation to subsection (1) of that sections; and

(b) paragraph (b) of the said subsection (6), subsection (2) and (3) of section 350 of the 1975 Act shall apply as they do in relation to subsection (1) of that section.

(8) Subject to subsection (9) below, an application to admit a statement as evidence by virtue of this section shall be made-

(a) in proceedings on indictment in the High Court, by giving notice of such application to the Court and to the other parties, and the giving of such notice shall be treated for the purposes of section 76 of the 1975 Act (preliminary diets) as if it were notice of a matter in respect of which the Court was required to order a preliminary diet;

(b) in proceedings on indictment in the sheriff court, by giving notice of such application to the court and to the other parties as if it were a matter referred to in section 75A(2) of the 1975 Act (first diets); and

(c) in summary proceedings, at the intermediate diet held under section 337A of the 1975 Act (intermediate diets),

and the application shall be determined at, as the case may be, the preliminary diet, first diet or intermediate diet.

(9) An application to admit a statement as evidence by virtue of this section may be made at the trial diet where-

(a) the grounds for making the application are as mentioned in paragraph (d) or (e) of subsection (1) above; or

(b) the party seeking to make the application satisfies the court that there was good reason for not complying with subsection (8) above.

(10) For the purposes of paragraph (e) of subsection (1) above, the reference to a witness refusing to take the oath or affirmation or, as the case may be, to having been sworn includes a reference to a child who has refused to accept an admonition to tell the truth or, having been so admonished, refuses to give evidence as mentioned in that paragraph.

Admissibility of prior statements of witnesses.

2.-(1) Subject to the following provisions of this section, where a witness gives evidence in criminal proceedings, any prior statement made by the witness shall be admissible as evidence of any matter stated in it of which direct oral evidence by him would be admissible if given in the courts of those proceedings.

(2) A prior statement shall not be admissible under this section unless-

(a) the statement is contained in a document;

(b) the witness, in the course of giving evidence, indicates that the statement was made by him and that he adopts it as his evidence; and

(c) at the time the statement was made, the person who made it would have been a competent witness in the proceedings.

(3) For the purposes of this section, any reference to a prior statement is a reference to a prior statement which, but for the provisions of this section, would not be admissible as evidence of any matter stated in it.

(4) For the purposes of subsections (2) and (3) above, a prior statement does not include a statement-

(a) contained in a precognition on oath; or

(b) made in other proceedings, whether criminal or civil and whether taking place in the United Kingdom or elsewhere.

Construction

3.-(1) For the purposes of this Act, a "statement" includes-

(a) any representation, however made or expressed, of fact or opinion; and

(b) any part of a statement,

but, subject to subsection (2) below, does not include a statement in a precognition.

(2) Subject to section 2(4) of this Act, a statement contained in a precognition on oath is a statement for the purposes of this Act.

(3) For the purposes of this Act a statement is contained in a document where the person who makes it-

(a) makes the statement in a document personally;

(b) makes a statement which is, with or without his knowledge, embodies by whatever means or by any person in a document; or

(c) approves a document as embodying the statement.

(4) In this Act-

1968 c.49

"criminal proceedings" include any hearing by the sheriff under section 42 of the Social Work (Scotland) Act 1968 of an application for a finding as to whether grounds for the referral of a child's case to a children's hearing are established, in so far as the application relates to the commission of an offence by the child;

"document" includes, in addition to a document in writing-

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

(b) any photograph;

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

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

"film" includes a microfilm;

"made" includes allegedly made.

(5) Nothing in this Act shall prejudice the admissibility of a statement made by a person other than in the course of giving oral evidence in court which is admissible otherwise than by virtue of this Act.

(6) Nothing in this Act shall apply to a statement made by the accused.

Citation, commencement,
Transitional provision and extent

4.-(1) This Act may be cited as the Criminal Evidence (Scotland) Act 1994.

(2) This Act shall come into force on such day as the Lord Advocate may by order made by statutory instrument appoint.

(3) Nothing in this Act shall apply to-

(a) proceedings commenced; or

(b) where the proceedings consist of an application to the sheriff by virtue of section 42(2)(c) of the Social Work (Scotland) Act 1968, an application made,

1968 c.49

before this Act comes into force; and for the purposes of paragraph (a) above, solemn proceedings are commenced when the interdictment is served.

(4) This Act extends to Scotland only.

EXPLANATORY NOTES

Note:

In the interests of brevity these notes are written on the assumption that the Bill is enacted - eg "Clause 1(2) implements Recommendation 3", rather than "Clause 1(2), if enacted, would implement Recommendation 3".

Clause 1

This clause implements Recommendations 3 to 12, 14 and 15. It rationalises certain exceptions to the hearsay rule in criminal proceedings and adds further exceptions with the object of making hearsay evidence of a statement admissible as evidence of the truth of its contents if there are insurmountable difficulties in the way of obtaining the direct evidence of the maker of the statement. It also prescribes rules of evidence and procedure which are to apply when a statement is tendered as evidence by virtue of any of the exceptions. The Bill neither abolishes any of the existing exceptions to the hearsay rule nor excludes the creation of further exceptions by judicial development of the law, or the admission of hearsay by agreement of the parties in a particular trial: see the note to clause 3(5) below.

"Statement", "statement contained in a document" and "document" are defined in clause 3(1) to (4).

Subsection (1)

This subsection implements Recommendation 4(1). By way of exception to the hearsay rule it makes admissible as evidence of any matter contained in it a statement which falls within any of the provisions of paragraphs (a) to (e) provided that, if the maker of the statement gave evidence about that matter at the trial, his evidence would be unobjectionable. (See paragraphs 5.25, 5.26, 5.28.) Paragraph (a) reforms existing exceptions to the hearsay rule, while paragraphs (b) to (e) introduce new exceptions.

Paragraph (a)

This paragraph implements Recommendations 5 and 6. Under the present common law a statement by a deceased person is admissible as evidence of its contents unless the circumstances raise a presumption that it does not truly reflect what was in his mind. This paragraph simplifies and improves the law. It provides that statements by deceased persons are admissible as evidence of their contents subject only to the qualifications which the Bill applies generally to statements admissible by virtue of clause 1. (See paragraphs 5.34, 5.35.)

It appears that at common law permanent insanity is the only medical condition which renders admissible the statement of a person who is too ill to give evidence. This paragraph extends this exception to cover any person who is unfit to give evidence "by reason of his bodily or mental condition". These words, which also appear in section 23(2)(a) of the Criminal Justice Act 1988, are intended to cover infirmity of any kind, permanent or temporary. However, this exception applies only where the witness is too ill to give evidence in any competent manner, such as by giving evidence on commission. (See paragraphs 5.36 to 5.39.)

Paragraph (b)

This paragraph implements Recommendation 7 and introduces a new exception to the hearsay rule. The maker of the statement must be outwith the United Kingdom, the Channel Islands and the Isle of Man.

The party tendering the statement must identify the maker to the satisfaction of the court and must establish that it is not reasonably practicable to bring him to court or to obtain his evidence in any other competent manner. The "reasonably practicable" test is intended to require the party to make serious efforts to obtain the maker's evidence and to entitle the court to take into account such matters as the expense of bringing the maker to court or the importance of the information in the statement. (See paragraphs 5.40 to 5.47.)

Paragraph (c)

This paragraph implements Recommendation 8 and introduces a further new exception. Under the present law a statement is not admissible as evidence of the matter contained in it on the ground that the maker of the statement cannot be found. This paragraph admits hearsay in such circumstances, provided that the maker of the statement is sufficiently identified and the party tendering the statement satisfies the judge that all reasonable steps have been taken to find him. (See paragraphs 5.48 to 5.53.)

Paragraph (d)

Paragraphs (d) and (e) introduce new exceptions to the hearsay rule in three situations where a person who is called as a witness does not give evidence on matters about which he or she has previously made a statement. Evidence of the statement may be led to prove the truth of what he or she then said. (See paragraphs 5.54 to 5.56.)

Paragraph (d) implements Recommendation 9(c). It applies where a witness claims the privilege against self-incrimination in relation to any matter in the statement and the judge rules that he is not obliged to answer questions on the matter. (See paragraphs 5.59 to 5.62.)

Paragraph (e)

Sub-paragraph (i)

This sub-paragraph implements Recommendation 9(a). It applies where a person is called as a witness but refuses to take the oath or affirmation (or, if a child, to accept an admonition: see clause 1(10)). (See paragraphs 5.57, 5.62.)

Sub-paragraph (ii)

This sub-paragraph implements Recommendation 9(b). It applies where a person is called as a witness and has been sworn or has affirmed ("swear" includes "affirm and declare": Interpretation Act 1978, Schedule 1 *sv* "Oath") or, if a child, has been admonished (see clause 1(10)). Evidence of the statement is admissible if the witness refuses to answer a question or questions on the subject matter of the statement after being directed to answer by the trial judge. (See paragraphs 5.58, 5.62.)

Subsection (2)

This subsection implements Recommendation 3 (see paragraphs 5.21 to 5.24). It provides that a statement is admissible under subsection (1) if either of the following conditions is satisfied.

Paragraph (a)

The statement is "contained in a document": see clause 3(3).

Paragraph (b)

The statement is made "otherwise than in a document", that is, either orally or by conduct. Here, first-hand evidence of the making of the statement must be given orally by a witness who personally heard or saw it being made: multiple hearsay is excluded.

Subsection (3)

Subsection (3) implements Recommendation 4(2). It provides that the maker of the statement must have been a competent witness at the time when he or she made the statement. (See paragraphs 5.27 to 5.28.)

Subsection (4)

This subsection implements Recommendation 10. It provides a safeguard against the abuse of the exceptions to the hearsay rule permitted by subsection (1). It makes a statement inadmissible if the party tendering it, or anyone acting on his behalf, has brought about the conditions required by the exception on which he founds in order to prevent the maker's evidence from being available. (See paragraphs 5.63 to 5.64.)

Subsection (5)

This subsection implements Recommendation 14 and makes admissible evidence relative to the credibility and reliability of the maker of the statement.

Paragraph (a)

This paragraph makes admissible evidence which would have been admissible as relevant to the credibility of the maker if he had been called as a witness. (See paragraphs 6.12, 6.13, 6.20.)

Paragraph (b)

This paragraph adapts the common law rules as to attacks on the credibility of a witness in cross-examination. (See paragraphs 6.15, 6.16, 6.20.)

Paragraph (c)

This paragraph adapts the rules as to the admissibility of evidence that a witness has made a statement inconsistent with his evidence. (See paragraphs 6.17, 6.18 to 6.20.)

Subsection (6)

This subsection and subsection (7) implement Recommendation 15. This subsection provides that where a party has led evidence relative to the credibility or reliability of the maker of the statement by virtue of subsection (5), the judge should be entitled to permit either party to lead additional evidence of such description as the judge may specify. The party must make the motion prior to the speeches to the jury or, in a summary trial, before the prosecutor begins to address the judge on the evidence. (See paragraphs 6.21 to 6.23.)

Subsection (7)

This subsection provides that the judge may permit the additional evidence to be led notwithstanding that in solemn procedure a witness or production has not been included in a list or notice (1975 Act, section 149(2)(a)), or that in solemn or summary procedure a witness must be recalled (1975 Act, sections 149(2)(b), 350(2)). It further provides that the judge may adjourn or postpone the trial before permitting the additional evidence to be led (1975 Act, sections 149(3), 350(3)). (See paragraphs 6.21 to 6.23.)

Subsection (8)

This subsection implements Recommendation 12(1). It provides that as a general rule a party who wishes to lead evidence of a statement by virtue of clause 1(a), (b) or (c) (that is, where the maker is dead, ill or abroad, or cannot be found) must make an application to the court at a pre-trial diet. (See paragraphs 6.3 to 6.7, 6.9.)

Paragraph (a)

This paragraph deals with High Court trials. The party must give notice of his application and when he does so the Court is to order a preliminary diet.

Paragraph (b)

This paragraph deals with jury trials in the sheriff court. Here the party must give notice prior to the mandatory first diet.

Paragraph (c)

This paragraph deals with summary trials. The application must be made at the intermediate diet.

Subsection (9)

This subsection implements Recommendation 12(2). It allows an application to be made at the trial diet in two sets of circumstances. (See paragraphs 6.8, 6.9.)

Paragraph (a)

This paragraph allows an application to be made at the trial diet by virtue of clause 1(d) or (e) (that is, where a witness at the trial has refused to give evidence).

Paragraph (b)

This paragraph allows an application to be made at the trial where the party satisfies the court that there was good reason for not making the application at the pre-trial diet.

Subsection (10)

This subsection implements Recommendation 9 by extending subsection (1)(e) to a child who is called as a witness and either refuses to accept an admonition or, having been admonished, refuses to answer a question or questions after being directed by the judge to do so. (See paragraphs 5.57, 5.58, 5.62.)

Clause 2

This clause implements Recommendations 16 to 18. It extends the range of circumstances in which a statement made by a witness before the trial (a prior statement) is admissible as evidence of the truth of its contents.

Subsection (1)

This subsection implements in part Recommendations 16, 17 and 18. It corresponds to the leading provision of clause 1(1) and provides that a prior statement to which clause 2 applies is admissible as evidence of the matters stated in it only if the witness's direct oral evidence of these matters would be admissible. (See paragraphs 7.16, 7.24, 7.29, 7.43, 7.49, 7.58.)

Subsection (2)

This subsection implements Recommendation 18(2). It applies to a witness's prior statement which is inadmissible as evidence of the truth of its contents under the present law (see clause 2(3)) other than one made in a precognition or in other proceedings (see clause 2(4)). It provides that a prior statement is to be admissible if the conditions in paragraphs (a), (b) and (c) are satisfied. (See paragraphs 7.39 to 7.49.)

Paragraph (a)

The statement must be contained in a document. (See paragraph 7.44 and the notes to clause 3(3).)

Paragraph (b)

The witness must acknowledge that he made the statement and must adopt it as his evidence. (See paragraph 7.47.)

Paragraph (c)

The witness must have been a competent witness at the time when he made the statement. This provision corresponds to clause 1(3). (See paragraph 7.48.)

Subsection (3)

This subsection implements Recommendation 18(1) and provides that this clause applies only to any prior statement (other than one made in a precognition or in prior proceedings) which is

inadmissible under the present law as evidence of the truth of its contents. (See paragraph 7.17.) Subsection (2) may thus be resorted to in any case where its conditions are satisfied and the principle of *Jamieson v HM Advocate (No 2)* 1994 SCCR 610 (see paragraph 7.8) is considered not to apply. (See paragraph 7.43.)

Subsection (4)

This subsection implements Recommendations 16 and 17.

Paragraph (a)

This paragraph implements Recommendation 16 and provides that a witness's prior statement in a precognition on oath is admissible as evidence of the truth of its contents whether the witness adopts it as his evidence or not. (See paragraphs 7.21 to 7.24.)

Paragraph (b)

This provision implements Recommendation 17 and provides that a witness's prior statement in other proceedings is likewise admissible, whether the other proceedings were civil or criminal, and whether they took place within or outside the United Kingdom. (See paragraphs 7.21 to 7.22, 7.25 to 7.29.)

Clause 3

Subsection (1)

This subsection implements in part Recommendation 2(a). The definition of "statement" is derived from section 9 of the Civil Evidence (Scotland) Act 1988 and paragraph 8 of Schedule 3 to the Prisoners and Criminal Proceedings (Scotland) Act 1993. (See paragraphs 5.4 to 5.13, 5.20.)

Subsection (2)

This subsection also implements in part Recommendation 2(a). It provides that a statement in a precognition on oath should form an exception to the rule in subsection (1) that a statement in a precognition should be outside the scope of the Bill. (See paragraphs 5.5, 5.20.)

Subsection (3)

This subsection implements Recommendation 2(c). (See paragraphs 5.16 to 5.20.) A statement is to be regarded as "contained in a document" if paragraph (a), (b) or (c) is satisfied. On paragraph (a) see paragraph 5.17; paragraph (b), paragraph 5.19; paragraph (c), paragraph 5.18.

Subsection (4)

These definitions are identical to those in paragraph 8 of Schedule 3 to the Prisoners and Criminal Proceedings (Scotland) Act 1993. On "document" and "film" see Recommendation 2(b) and paragraph 5.14. On the admissibility of copies of documents by virtue of paragraph 1 of Schedule 3 to the 1993 Act see paragraph 5.15.

Subsection (5)

This provision implements Recommendation 1 and provides that hearsay statements which are admissible under the present law will continue to be admissible. (See paragraph 5.3.)

Subsection (6)

This subsection implements Recommendation 11. (See paragraphs 5.71 to 5.77.)

Clause 4

Subsections (1), (2) and (4)

These are provisions in the usual form on short title, commencement and extent.

Subsection (3)

This is a transitional provision which implements Recommendation 21. It is similar to paragraph 7(1)(c) and (2) of Schedule 3 to the Prisoners and Criminal Proceedings (Scotland) Act 1993 and provides that the Bill is not to apply to proceedings commenced before it comes into force. (See paragraph 7.63.)

Appendix B

List of Respondents to Discussion Paper No 77.

Association of Chief Police Officers (Scotland)
Association of Scottish Police Superintendents
Court of Session Judges
Crown Office
Faculty of Advocates
Sheriff G H Gordon, QC
Mr G J Junor, Clerk to the District Court, Ettrick and
Lauderdale District Council
Law Society of Scotland
The Right Hon the Lord McCluskey of Churchill
Procurators Fiscal Society
Mr J Renton, Scottish Director, Health and Safety Executive
Royal Faculty of Procurators in Glasgow
Mr James A Scott, Depute District Administrator, Renfrew
District Council
Scottish Courts Administration
Scottish Law Agents Society
Scottish Legal Aid Board
Mr C Scott Mackenzie, Stornoway
Sheriffs' Association
Sheriffs' Principal
University of Aberdeen, Faculty of Law