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CPS

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1 November 1995

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Our Reference: SR/L219/95

Your Reference: 17-19-02

Stephen Silber QC
Law Commission
Conquest House
37/38 John Street
Theobalds Road
LONDON WC1N 2BQ

Dear Mr Silber,

EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS

I refer to [redacted] letter of 9 October and now have pleasure in enclosing the Crown Prosecution [redacted] esponse to Consultation Paper No. 138.

I hope the document will be of help to you in deciding how best to progress with the much needed reforms of this part of the law.

As I was responsible for the drafting of the response, I will be happy to provide any further information that you may require. My direct line is GRO

[redacted]
Prosecution Policy Division
Policy Group

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LAW COMMISSION CONSULTATION PAPER

EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS

CROWN PROSECUTION SERVICE RESPONSE

Our main conclusions are summarised below and the remainder of this document is an explanation of how and why we have arrived at those conclusions.

HEARSAY EVIDENCE

- **We most favour Option 7 modified to make all hearsay evidence admissible if it is both relevant and probative.**

- **One statute should define " hearsay evidence " and contain all the law relating to it.**

- **Evidence should be admissible for both prosecution and defence according to the same test - that it is both relevant and probative.**

THE RULE AGAINST PREVIOUS CONSISTENT STATEMENTS

- **We agree broadly with Option 3.**

COMPUTER EVIDENCE

- **We believe s.69 Police and Criminal Evidence Act 1984 should be repealed.**

EXPERT EVIDENCE

- **We are not aware of major problems but have no objections to Option 5.**

1. LIMITATIONS ON REFORM

1.1 The CPS agrees with the Commission that any reform of domestic law should be compatible with the ECHR. [CP 9.4]

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2. PRELIMINARY ISSUES

2.1 The CPS also agrees with the Commission that the hearsay rule is excessively complex and leads to confusion and anomalous results. The rule could sensibly be reformed for those reasons alone. [CP 9.2]

2.2 The CPS agrees that if the only evidence against a person is hearsay evidence that should not amount even to a case to answer. We are surprised that this should amount to a proposed reform. The CPS is required to apply the Code for Crown Prosecutors. Section 5.3 a of the Code requires Crown Prosecutors to consider whether evidence may be excluded because it is hearsay. If it is hearsay the Crown Prosecutor must be satisfied that there is enough other evidence for a realistic prospect of conviction. In practice, if the only evidence against a person was unsupported hearsay, the CPS would not continue with the case.

2.3 We have assumed that, in paragraph 2.2 we have correctly understood the Commission's proposal that "unsupported hearsay should not be sufficient proof of any element of an offence." An alternative interpretation of paragraph 9.5 of the Consultation Paper is a literal one - and for the sake of completeness we must deal with it.

2.4 It is, that however much other evidence there may be against a person, if the only evidence in relation to one element of the offence is hearsay then no case to answer is made out.

2.5 We are unable to agree with that interpretation. It may help to explain why with examples:

(1) At midnight a security guard sees X break into a building and enter a computer room. Two minutes later X emerges, is later arrested by the police and makes no comment when interviewed. The computer, which belongs to Z, produces a printout indicating that at 0001 hours on the night in question a large amount of money

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was transferred out of Z's account without his authority.

Assuming that the computer printout is hearsay, and that the requirements of s.24 Criminal Justice Act 1988 and s.69 Police and Criminal Evidence Act 1984 are satisfied is justice done if the printout cannot be used to prove an essential element of an offence - ie charges against X of burglary, theft, false accounting or under the Computer Misuse Act 1990 ?

(2) S.32A Criminal Justice Act 1988 allows video recordings of child witnesses to be given in evidence in certain circumstances. S.33A of the same Act provides for a child's evidence to be given unsworn and s.34(2) of the Act removes the need for corroboration of childrens' evidence. Currently a video interview of a child can amount to the sum total of the evidence against a person and a jury could, in strict law, convict on it. Applying the proposal "unsupported hearsay should not be sufficient proof of any element of an offence" to this example would involve repeal of s.32A Criminal Justice Act 1988. We query whether this would command any public support. (What if the prosecution case amounted to several video interviews of different children all relating to the same incident ?)

[CP 9.5]

3 JUDICIAL DISCRETION

3.1 The CPS view is that judicial discretion is such an inherent part of the criminal justice system that any attempt to operate without it would be generally unacceptable. Even if a category based regime were to be implemented, judicial discretion either at common law or under s.78(1) Police and Criminal Evidence Act 1984 could not be excluded.

3.2 We recognise the benefits of judicial discretion in allowing evidence to be

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assessed on a case by case basis. We agree with the Commission that a clear comprehensible structure for the exercise of judicial discretion in relation to evidence is lacking. If, as mentioned in paragraph 4.41 of the Consultation Paper, the Court of Appeal has difficulty in arriving at a definitive decision as to how ss.25 and 26 Criminal Justice Act 1988 relate to one another, similar problems will afflict judges, magistrates and lawyers in the lower courts.

3.3 We appreciate that judicial discretion leads to less certainty. In the CPS's response to the Commission's Questionnaire we highlighted some of the practical problems we had encountered. Our view was that, whilst we accepted the need for a defendant to receive a fair trial, judicial discretion to admit evidence was normally likely to be exercised in favour of the prosecution when the evidence was subordinate or peripheral to the case. We accepted that the courts must be less ready to admit decisive evidence which cannot be challenged by the defence. We remain of that view but feel that the problems of uncertainty are compounded by the complexity of the law in this area.

3.4 We did tentatively consider a two tier system with judicial discretion being severely limited or even excluded in the magistrates' courts but retained in the higher courts. We felt that the idea had little to recommend it. It might improve certainty but at the expense of justice. [CP 9.6 - 9.25]

4 "HEARSAY" A DEFINITION

4.1 The Commission's suggested definition of hearsay is: "an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion that the person intended to assert."

4.2 We would wish to have as simple a definition as possible. We have to say that we are more attracted to Professor Cross's definition of hearsay as "an 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."

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4.3 The difficulty we see with the Commission's definition is that the court will have to determine the intention of the person concerned. All the difficulties inherent in identifying what is an implied assertion remain. Professor Cross's definition omits any reference to intention but that still would mean that implied assertions were inadmissible in the light of the ruling in Kearley.

4.4 We would prefer an alternative approach of having a statutory definition of hearsay evidence coupled with a framework defining tightly the scope of judicial discretion on its admissibility.

4.5 As mentioned above, we favour Professor Cross's definition and further suggest that all of what is currently hearsay evidence should be admissible provided that the court finds that it is both relevant and probative. [CP 9.26 - 9.36]

5 OPTIONS FOR REFORM

5.1 We start with two premises:

1) that the present law is in need of reform to make it more readily understandable

2) that any new law must realistically allow for the exercise of some degree of judicial discretion.

5.2 We refer to the various options for reform as they appear in the Consultation Paper (Options 2 to 6 - there being no Option 1).

6 OPTION 2

6.1 Our view is that this would be impractical. The criminal justice system in England and Wales is adversarial and based on the calling of live witnesses. The Royal Commission on Criminal Justice did not recommend any fundamental alteration

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to that.

6.2 This option would permit either prosecution or defence to base a case wholly on hearsay evidence unfettered as to either quality or quantity. If it were to become law, Crown Prosecutors would have to take decisions on whether to prosecute on the basis of potentially poorer quality evidence than at present. It would be impossible to make a meaningful judgment on what evidence the court might rely upon in reaching its decision. An increase in the number of wrongful convictions and in the workload of the appellate courts would be a virtually certain result. Equally those lowered evidential standards would apply to the defence - for example by using evidence that could not be challenged, and could potentially be fabricated, to attack the character of a live prosecution witness or to support an alibi. [CP 10.3 - 10.27]

7 OPTION 3

7.1 This option, to begin with, is readily understandable. Unlike Option 2 it compels the parties to seek the best evidence available and to that extent would preserve current standards.

7.2 This option, which works in the German inquisitorial system, would have to have in built safeguards, applying to both prosecution and defence, if it were to work satisfactorily in England and Wales.

7.3 Unless there was a limit to the types of evidence admissible in this option it would amount to Option 2 by another name. The quality of the evidence might not be so adversely affected but the potential for quantity would remain uncontrolled.

7.4 We would envisage having a statutory definition of hearsay evidence and, in the absence of better evidence, it would not be admissible unless it was both relevant and probative.

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7.5 A further necessary control would be to require both prosecution and defence to give advance notice to each other and the court of details of any hearsay evidence it was proposed to rely on and the reason for not relying on first hand evidence.

This would encourage thorough and timely preparation of the case and curb any temptation not to seek the best available evidence from the outset.

7.6 In paragraph 10.33 of the Consultation Paper the question is raised of the accused present in court who declines to give evidence. We believe that s.35 Criminal Justice and Public Order Act 1994 covers this situation.

7.7 Paragraph 10.32 of the Consultation Paper deals with the danger of increased fabricated evidence. We question whether this is likely. Witnesses on occasions now make false statements in the knowledge of a future court hearing - relaxation of the hearsay rule will not, we suspect, encourage others to do likewise. [CP 10.28 - 10.35]

8 OPTION 4

8.1 We agree with the Commission that this option has twin disadvantages over even the current system. It would be even more difficult to understand and even less certain in its practical application. [CP 10.36 -10.55]

9 OPTION 5

9.1 We agree with the Commission that this option, though laudable in its intended object, simply adds a further layer of uncertainty on to the existing ones. [CP 10.56 - 10.64]

10. OPTION 6

10.1 This option is for a category based system. The first problem is to define all the relevant categories of evidence. The Commission recognise that it is a difficult one to overcome. We agree, not least because the law lags behind rather than

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leads developments in the outside world. Computers, telecommunications and medical science are but three of many fields.

10.2 A category based system would be comprehensible but not necessarily certain. The categories would require systematic review and revision and failure to do so could result in injustice either to prosecution or defence.

10.3 We note that in paragraph 10.68 of the Consultation Paper that the Commission favours a category based system because it is not aware of any miscarriage of justice arising from the operation of the Criminal Justice Act 1988. We cannot help wondering whether that bears out our impression that this kind evidence tends to be admitted only when it is of a subordinate or peripheral nature.

10.4 The fundamental drawbacks of a category system are that it carries an inbuilt obsolescence as well as excluding any form of judicial discretion to correct its faults. We do not view it as being either workable or generally acceptable. [CP10.65 - 10.72]

11 OPTION 7

11.1 This is option 6 with a limited judicial discretion added to act as a "safety valve" and we will deal with the various proposals in the order that they appear in the Consultation Paper.

11.2 **Proposal 1**

11.3 We agree with this but would commend Professor Cross's definition of hearsay.

11.4 **Proposal 2**

11.5 We broadly agree but question the need to limit the proposal to first hand hearsay. We accept that hearsay evidence should in the ordinary course of events

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be given less weight than live evidence, but we question whether in all circumstances multiple hearsay should be given no weight whatever. The "safety valve" provision is designed to allow for multiple hearsay in any event and we wonder whether, even if evidence is multiple hearsay, it should not be admissible anyway (provided that it is both relevant and probative).

11.6 **Proposal 3**

11.7 There is nothing objectionable in this proposal but we have the following comments:

Proposal 3(b)(i)
Is it realistic to use the fact that a witness is outside the United Kingdom as a basis for reading his or her statement ? It may cost more and take longer to get from Edinburgh to London than it does from Paris.

We suggest that the Commission consider firstly the merits of expanding the categories of evidence that may be admitted both in England and Wales and elsewhere via live television link. A second consideration is whether to extend this facility to the magistrates' courts. The witness could then be cross examined and the court would almost certainly be able to make a better assessment of the witness than simply having his or her statement read.

Proposal 3 (c)
Witnesses may refuse to give evidence for all manner of reasons. Frequently it happens that one party in a relationship assaults the other, but as time passes they become reconciled. The aggrieved may no longer wish to support the prosecution. Proposal 3(c) would permit a prosecutor to go ahead with such a case against the aggrieved's wishes. (A witness may now be compelled to attend court if it is felt in the public interest to do so).

Another type of case is where a witness makes a false statement. If, knowing that, the witness refuses to testify can it be right to admit the witness's statement ?

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Finally, defendants are witnesses. Does proposal 3(c) not remove the right to remain silent ?

Given that for the purposes of Proposal 3(c) there is a witness in court refusing to testify, or to continue to testify, would it not be wiser to let the court conduct its own enquiry as to the reasons and act accordingly rather than making the witness's statement automatically admissible ?

11.8 **Proposal 4**

11.9 We agree

11.10 **Proposal 5**

11.11 We agree, but given the need to make the law as simple and comprehensible as possible we suggest that, rather than preserving or re-enacting these various statutes, they should all be incorporated into one homogenous piece of legislation allowing any person interested to refer to the statute law on hearsay evidence at as a whole.

11.12 **Proposal 6**

11.13 We agree

11.14 **Proposal 7**

11.15 We fully understand the thinking behind the need for a "safety valve" provision. Our concern is that, given that the magistrates' courts deal with the bulk of criminal cases in England and Wales it is there that the "safety valve" is likely to be used most often.

11.16 We considered the idea of a two tier system with very limited discretion in the magistrates' court and rejected it. Paragraph 11.38 of the Consultation Paper

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invites views as to the circumstances in which the safety valve should be available. Unfortunately we cannot envisage any practical way to limit its use.

11.17 Every case, no matter how minor, is individual. We operate in an adversarial system. If there is to be a safety valve it must be available as and when required. The price for that is that some unmeritorious attempts to use it, particularly in the magistrates' courts, will be inevitable.

11.18 We refer to paragraph 11.8 of the Consultation Document. The safety valve caters amongst other things for multiple hearsay. Given that the magistrates are judges of fact and law we imagine that, like a jury, they may be misled or distracted. They may also spend time listening not only to the evidence but the attendant submissions. Our view is that the objectives of simplifying and speeding up the judicial process are unlikely to be achieved. [CP 10.73 - 11.61]

12 SHOULD REFORMS TO THE HEARSAY RULE APPLY EQUALLY TO PROSECUTION AND DEFENCE IN CRIMINAL CASES ?

12.1 (We did not look at Courts - Martial, Professional Tribunals or Coroners' Courts as we have do not have sufficient expertise of their various operations for us to be able to make meaningful comments).

12.2 We favour the level playing field approach that rules on admissibility of evidence should apply equally to prosecution and defence. As regards hearsay evidence, it has greater potential for unreliability than live evidence.

12.3 We consider it would be wrong to make it more difficult to prove cases by introducing more liberal evidential standards for the defence. Other considerations apart, it would do nothing to simplify the system and would be unlikely to improve public confidence that justice was being done.

12.4 We recognise that under ss. 23 and 24 Criminal Justice Act 1988 the law currently

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imposes a higher standard of proof of establishing the foundation requirements on the prosecution than it does on the defence. [CP p.180 footnote 6].

12.5 We wonder whether this does not confuse the overall standard of proof with the standard by which a particular piece of evidence ought or ought not to be admitted. We recommend that the same test should apply to both parties and it should be simply that the evidence sought to be admitted is both relevant and probative. The weight to be attached to it should be a matter for the magistrates or jury as the case may be.

12.6 This solution has the advantage of being simpler, and fairer than the present law. It would in no way affect the overall standard of proof applicable to the prosecution nor curtail judicial discretion to exclude evidence at common law or under s.78 Police and Criminal Evidence 1984. [CP 12.2 - 12.15]

13 THE RULE AGAINST PREVIOUS CONSISTENT STATEMENTS

13.1 We agree with the Commission that this area of the law needs reform. The area in which the current law causes greatest practical problems is the inability for a witness to refresh his or her memory from a previous statement when giving evidence. In our view Option 3 solves that main problem, and others, in a common sense manner and brings legal practice into line with what actually happens in daily life.

13.2 We wonder whether the test in Option 3(d) "reasonably be expected" is intended to be an objective or subjective test.

13.3 It might not be reasonable, for example, to expect a witness with Alzheimer's disease or with particular memory problems to remember very much at all. On the other hand a person with a particular interest and knowledge of some topic could reasonably be expected to remember more about details concerning it than the man or woman in the street.

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13.4 A second consideration is the nature of the details that the witness could not recall. Were they routine or out of the ordinary; were they of great quantity or otherwise ?

13.5 A possible way out of becoming entangled in objective and subjective tests would simply be to delete from Option 3(d) the words "and the details are such that the witness cannot reasonably be expected to remember them." In effect this is a subjective test but, memory being in its own right subjective, we cannot conceive of any more practical alternative. [CP 13.1 - 13.55]

14 COMPUTER EVIDENCE

14.1 We agree that the main problem with computer evidence is probably incorrect entry of data. Experience shows, though, that the other problems of software faults, hardware faults and unauthorised tampering with computer systems are not without significance.

14.2 S.69 of the Police and Criminal Evidence Act 1984 is, frankly, a source of difficulty to us. We are all too familiar with problems in complying with it, which are increasing as computer systems develop. We note with interest that the Internet is not mentioned in the Consultation Paper.

14.3 We agree with the Commission that s.69 Police and Criminal Evidence Act 1984 is becoming increasingly out of touch with developments in technology and it should be repealed. [CP 14.1 - 14.32]

15 EXPERT EVIDENCE

15.1 The Royal Commission on Criminal Justice asked the Commission to look at this topic because of particular concern that the system might be exploited by defence practitioners not only seeking to cross examine the prosecution expert but also the

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various assistants who may have helped in carrying out tests.

15.2 The Crown Prosecution Service was alive to the problem and considered it in 1992 with particular reference to statements from the Forensic Science Service.

15.3 Forensic scientists' witness statements now contain details of those who have assisted in the various tests and their role in those tests. If the defence wish to have more details of the part played by an assistant we would normally obtain a witness statement and serve it on the defence. In a case where the expert relied on information provided by an assistant which he was not in a position to fully explain, then we would normally call the assistant to give evidence so that the court was in possession of all relevant facts.

15.4 In practice we are not aware of any widespread attempts to exploit the system by defence practitioners but we would no objection to Option 5 as suggested by the Commission in this part of the Consultation Paper. [CP 15.1 - 15.26]

16 CONCLUSIONS

16.1 Hearsay Evidence

16.2 We most favour Option 7 BUT modified so that:

Proposal 2 was replaced with a provision that, subject to common law and s.78 Police and Criminal Evidence Act 1984, all hearsay evidence be admissible if relevant and probative.

We would wish to see all the statute law on hearsay evidence incorporated into one piece of legislation also containing Professor Cross's definition of hearsay evidence.

16.3 We recommend that the same standard should apply to both prosecution and defence in seeking to have any evidence admitted namely that it be both relevant

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and probative.

16.4 As a less satisfactory alternative we would choose Option 3 - the best available evidence approach.
To use hearsay evidence prior notice would be required and reasons given for the unavailability of better evidence.

Hearsay evidence would be as defined by Professor Cross and this definition included in a statute.

Subject to the foregoing all hearsay evidence would be admissible provided the court found it both relevant and probative.

The same standard should apply to prosecution and defence in seeking to have evidence admitted namely that it be relevant and probative.

16.5 The Rule against Previous Consistent Statements

16.6 We agree with Option 3 in the Consultation Paper. We have minor misgivings on the interpretation of the wording in Option 3(d).

16.7 Computer Evidence

16.8 In our view s.69 and Schedule 3 Police and Criminal Evidence Act 1984 serve no useful purpose and should be repealed.

16.9 Expert Evidence

16.10 We are not aware of major practical problems over the use of Expert Evidence in court. We would not object, though, to Option 5 as proposed by the Commission.

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