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Date 9 November 1995

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Dear Stephen:

RE: EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS

... Further to my letter of 10 October, I now have pleasure in enclosing our response to your paper.

You will see that in general we agree with the approach that you are proposing to adopt, although we have made a number of suggestions concerning some aspects of the proposals. We do have one substantial concern. This relates to your proposals for satisfying the European Convention on Human Rights. We consider that in some respects your proposals go further than is required by the Convention.

I would be happy to provide you with any further information that you may need, or meet to discuss any aspects of our response which seem to you to require clarification.

I am also, at Mr Hammond's invitation, enclosing a copy of my minute to him commenting on the issues raised in your recent meeting concerning the law on dishonesty. I hope that this will be of some assistance.

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RESPONSE TO LAW COMMISSION`S CONSULTATION PAPER ON EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS

A. HEARSAY

INTRODUCTION

The Department agrees with the Law Commission that the current law is in need of reform and that option 7 is the most appropriate option. Option 7 appears to us to resolve the difficulties caused by the exclusion of cogent and reliable evidence, while clarifying and extending (where appropriate) the categories of admissible hearsay, and providing for their automatic admission. We set out below, however, a number of comments on points of detail.

The Department agrees with the Law Commission`s proposed definition of hearsay, and we welcome in particular the exclusion of implied assertions from the definition.

We have addressed one substantial issue in this response. This concerns the proposal, which follows the Law Commission's consideration of the relationship between the current and proposed law on hearsay and Article 6 of the ECHR, that there should not be a conviction where any ingredient of an offence depends on hearsay evidence alone, including confessions. This proposal causes us considerable concern and will have a major effect on criminal prosecutions. This aspect is discussed further below. In short, however, the Department is of the view that there may be many cases where otherwise unsupported but reliable and admissible hearsay evidence, whether oral or written, will constitute all or part of the evidence of one or more ingredients of an offence, and that therefore the proposal will result in many cases not being prosecuted which under the present law could be prosecuted. We are not persuaded that, given the case law on the ECHR, any change needs to be as broad as is proposed. In any event, in our view, confessions as evidence do not offend against the provisions of Article 6, which is concerned with the attendance of witnesses so that they can be tested in cross examination.

OPTION 7 AND THE LAW COMMISSION`S PROPOSAL

The most notable change is that first hand oral hearsay will be admissible for the first time (other than the old common law exceptions) if the unavailability/fear requirements are established and the witness is identifiable. 3(c) extends the admissibility of evidence from those not attending through fear to those who attend but cannot then bring themselves to start/finish their evidence, although it is not restricted to those in fear (see Department`s comments on this below). Although the new proposals seem to cover most situations that have given

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cause for concern in past cases, the discretion is intended to catch for example, multiple oral hearsay where its reliability and cogency is such that the interests of justice demand its admission.

The Department welcomes in particular these features of the proposals.

OBSERVATIONS ON SPECIFIC POINTS RAISED IN THE CONSULTATION PAPER

Observations are made on SOME of the aspects discussed in the Consultation Paper. As only a few matters are commented on, they are dealt with on a topic by topic basis.

1. Dying declarations - (3.29 and 7.18)

This rule arose on the basis that those settled in the hopeless expectation of death are unlikely to die with lies upon their lips. It is argued that there is no rationale why this rule should apply to murder/manslaughter cases only. The Department has not had the time to study the authorities, but it may be that the rule was built up around statements concerned with the identity of the killer. It is easy to see that the relationship in time between the identification of the killer and the act to which it relates adds greater weight to the argument for admissibility than it would where the declaration concerns some matter occurring some time previously and unrelated to the cause of death. Here time may have led to the reliability of the statement becoming open to question. The proposals would allow for the admission of such a statement regardless of the charge.

2. Oral hearsay

The Law Commission is of the opinion that while oral evidence may on occasion be less cogent than documentary evidence the law should not make a distinction between the two types of hearsay.

The Department considers that documentary hearsay can often be inherently more reliable than oral hearsay. For instance where something is reduced to writing at the time the information is received or soon thereafter, the room for error when relating what was said later is reduced, leaving just the reliability of the information conveyed open to question. Whereas if there is no written record, you have the additional features that the receiver's memory and his understanding of the information that was conveyed to him are susceptible to error. On the other hand striking information is likely to be remembered correctly in whatever form it is received.

We consider that the right approach is to leave it to the jury to weigh up the strength of the evidence and accordingly we agree with the Law Commission's proposal. The proposal would require the prosecution to call the witness where it is feasible to do so in cases in which the statutory exceptions do not apply.

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3. Preservation of statutory exceptions

(a) S.24 CJA 1988

The Law Commission proposes to preserve section 24 but repeal sections 25 & 26. We accept and welcome this approach. It will mean that documentary evidence covered by s24 will therefore be automatically admitted since the judge will no longer have a decision to take in the absence of a submission under s78 of PACE or under the common law. We think however that there is a strong possibility that there will be no change of approach on the part of counsel and judges, and that they will continue to think in terms of there being a decision to take as to whether this type of evidence should be admitted, and perhaps hark back to the type of criteria which at present are found in ss25 and 26. A central question to be addressed will be what is the proper scope of s78 and the common law in these circumstances. Presumably they ought not to be applicable in the type of situations that are presently covered by ss25 and 26. We think that it would be useful for guidance to be provided in this area, either on the face of the statute or through an early expression of judicial view, in order to avoid inconsistency of decision making on the part of judges.

The Department agrees that amendment of s24 is required to ensure that it is the provider of the information not the creator of the document whose unavailability needs to be established.

We agree it is important that arguments concerning the admission of evidence should be conducted and ruled upon at the pre trial hearings so that the prosecution can at least attempt to fill gaps where rulings go against them. We do not think that such arguments are appropriate to be dealt with in the Magistrates' Court in committal or dismissal proceedings. The prosecution may be well justified for resource reasons in seeking to rely on section 24 in particular.

(b) Other exceptions

No mention is made in the consultation paper of preserving s102 or s103 of the MCA 1980, or s30 CJA 1988. For the avoidance of doubt, we believe these should be included in any list of statutory exceptions. We note too that video evidence under s32A of the CJA is not included in the list of statutory exceptions. It is not clear whether this is deliberate or not. The paper is critical of the new law which was introduced by Part III of the Criminal Justice Act 1991 (see paras. 13.20 - 13.24). Nevertheless given that the law has only recently been introduced, and after much Parliamentary debate, we believe that there should be much fuller consideration of the issue before the law is effectively abrogated.

4. Hostile and fearful witnesses

The Law Commission comments (para 7.24) on the apparent oddity that section 23 allows for the admissibility as evidence of the truth of its contents of a statement of a witness proven to be kept out of the way through fear, while in the case of a hostile witness the statement is only admitted for credibility purposes.

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We consider that the distinction is reasonable. In the latter instance, the hostile witness has actually taken the oath and (apparently) lied. The other has simply not come to court through fear which will have had to be established beyond reasonable doubt. If a witness is prepared to lie, however fearful, they may well be less than reliable and it may be appropriate that his/her statement is not admitted as to the truth of its contents but only as to credit. We do not believe that either option 7 or the proposals concerning the admissibility of previous statements (para 13.55) would allow for the admission as evidence of the truth of its contents a previous statement which is inconsistent with evidence that the witness gives in court. If we are wrong in this understanding then our view is that the proposals ought not to extend to this situation.

The Department also notes that Option 7 category 3(c) of the proposals does not require that the refusal to give evidence is through fear. This would therefore allow for the stubborn witness who may have lied in his or her statement, rather than in evidence, to have their statement read. This is a category of witness whose statement the Department believes it is inappropriate to read to establish the truth thereof. Many witnesses come to a grinding halt when they find themselves in a corner from which there is no escape. We consider that a rule which allows for the automatic admission of their previous evidence as evidence of the truth of its contents in these circumstances is too generous to the witness. The case for the categories covered by the automatic exception is based on the fact that the balance between admitting the evidence and protecting the accused is clearly in favour of admitting the evidence. We do not consider that the outcome of the balancing test is as clear in the case of hostile witnesses. Our view is that automatic admissibility is better left to cover those who do not continue their evidence through fear. The previous evidence of a hostile witness could still be admitted under the safety valve.

We believe that the Law Commission may have unintentionally left one further situation in this area out of their proposals. This is the situation where a witness is found but refuses to come to court through fear. Category 3 (b) (ii) does not cover this situation, and neither does category 3 (c).

We favour the approach of providing examples of reasonable practicality (which would apply to all the situations in category (b)). We agree with the examples provided in para. 11.19.

5. Further thoughts on automatic admissibility.

A major concern regarding the automatic admissibility of evidence is the potential for fabrication. The dangers are greater in the case of defence evidence since the judge has a residual power to exclude prosecution evidence. For example, the defendant or other defence witness asserts that someone admitted the crime with which he is charged. He can identify them but they cannot be found or are at some known address abroad. Given that this would fall within the automatically admissible category, it is open to abuse. There would appear to be two options. The first is to

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leave it to the jury to assess the weight of the evidence given the inevitable question marks over such facts. The alternative is to have a discretion to exclude evidence which fails to meet some test of reliability. We believe that usually the jury should be well able to assess the reliability of evidence such as that in the example above by using their common sense. But juries do need protection from misleading and confusing evidence and because of the nature of the trial process are not in as good a position as the judge to tell whether evidence will waste the court's time. Accordingly we favour a limited discretion to exclude evidence along the lines of the USA example provided in the paper whereby evidence likely to mislead, waste the court`s time or confuse can be excluded.

The Department is against the introduction of a provision to exclude "post charge" hearsay, where hearsay statements made after the defendant has been charged would not be admitted, on the basis that they are more likely to be fabricated/unreliable. This unnecessarily fetters the judge`s discretion. The discretion that we propose and the common sense of juries should be an adequate safeguard.

6. The safety valve

Various cases are referred to in order to demonstrate the unfair consequences of the strict rules currently in force: inadmissible but potentially critical or apparently cogent exculpatory evidence could not be put before the jury. In particular, confessions by third parties, and other cases such as demonstrated by the facts of R v Sparks 1964 AC 964 and the type of anomaly that could be produced by a slight variant of the facts in R v Carrington [1994] Crim L R 438 (see para 4.29) should clearly be capable of admission in appropriate circumstances. It is intended that such evidence would be admissible under the new safety valve proposal.

First hand hearsay would become admissible under the automatically admissible categories given the right facts, but it is intended that in the case of multiple hearsay or other excluded categories the safety valve would catch any evidence clearly appropriate for admission in the interests of justice. Implied assertions would be admissible as falling outside the draft definition of hearsay.

We query whether the wording of the safety valve will produce the results intended. We appreciate that the intention is to create a limited exception, but the requirement in category 7 (c) (i) is so strict that we fear that many meritorious cases will be excluded. How often can it be stated with confidence that evidence is so positively and obviously trustworthy that the opportunity to test it by cross-examination can safely be dispensed with? That conclusion can perhaps sometimes be reached when it has been possible to study the demeanour of the witness in giving the evidence, but self-evidently in the circumstances covered by the proposed rule that opportunity does not arise. Will not judges rightly take as their starting premise that human understanding and powers of communication is often flawed, and that given that fact it is almost impossible to say that any

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evidence is so inherently reliable that there is no need for cross-examination?.

Further, the effect of the proposal would be to put the judge in the place of the jury on an issue of fact. We wonder if this goes too far. There are occasions under the present law where judges decide issues of fact, eg whether there has been oppression under s76, but they do not decide central issues. To continue the confessions example, the judge does not decide whether the confession is true. We can envisage circumstances in the future in which the defence, having gained the admission of evidence under the safety valve, might address the jury on the basis that since the judge has found the evidence to be positively and obviously trustworthy they really ought to accept it. We consider that there is a good case for limiting the judge's role to being a filter.

Given the problems discussed above we invite the Law Commission to consider a wider test, perhaps limited to interests of justice issues alone, with the aim of leaving questions of weight to be decided by the jury.

7. Article 6 of The European Convention on Human Rights

It seems that this is considered not to be an absolute rule (X V Austria Appl 4428/70 1972), and the discussion in chapter 5 helpfully draws attention to the approach taken by the Strasbourg Court in interpreting the Convention. In the light of the caselaw discussed in that chapter, we query whether the proposed new rule that unsupported hearsay should not be sufficient proof of any element of an offence needs to be in such wide terms. An illustration of particular problem areas for us may be helpful.

(a) Confessions. The Law Commission propose that the new rule would extend to confession evidence (page 178, footnote 91). This would mean that a defendant could not be convicted on the basis of a confession alone. This is a radical departure from the current accepted practice, the effects of which are not discussed in the consultation paper but do require further consideration. It does not seem to us that Article 6 affects the admissibility of confessions where the witness to the confession is available to give evidence, since art.6(3)(d) is concerned with the right to examine or have examined witnesses against defendants and that right is satisfied in these circumstances. This is the usual situation in a criminal trial where the police or other investigators give evidence as to what they were told by the defendant. Further, it is arguable that where the confession is contained in a tape recording which the jury are able to hear, or a transcript of which they can read, or in a video recording, art.6(3)(d) has no application since the evidence is provided direct to the jury and not through the medium of a witness. As to fairness generally, sections 76 and 78 of PACE protect the interviewee. Confessions can be the very best evidence of guilt. It may be impossible to prove certain ingredients of crimes without the confession. To prevent a conviction on such a premise might itself

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potentially offend Article 8 on the basis of the points made in chapter 5 about the position of victims. The Department would request that such a proposal be the subject of further consultation as a subject in its own right if the Law Commission maintains its view.

(b) Business records under s24. Section 24 CJA 1988 is relied on heavily by the Department in prosecuting fraud cases. It avoids the need to call a multitude of witnesses to prove relatively formal albeit sometimes critical matters. If the proposed rule concerning unsupported hearsay were to apply, s24 would be largely undermined.

Sometimes the source will not be identifiable to call first hand evidence and no other evidence will be available on that aspect.In R v Foxley (1995) CLR 636 a former MOD official was charged with receiving corrupt payments. Evidence of payments into Swiss bank accounts were produced as a result of a Letter of Request to the Swiss Authorities to prove that the payments were made. No one testified as to their creation and to the circumstances of it and the meaning etc. The Court of Appeal relied on section 24 for the admission of the documents and allowed for inferences to be drawn as to the circumstances of creation. Professor Smith argues that the documents were real evidence and not hearsay and therefore section 24 does not to need have been relied on. Even if he was right in that case, one can envisage cases with similar facts arising where other evidence to support reliable hearsay evidence would not be available.

More often though the witness could be traced, but it would take considerable time to deal with such evidence in court.

The Department does not consider that the admission of evidence of this nature breaches the general principle of unfairness in the Convention. The rule against hearsay stems from the need to call reliable evidence which can be tested as to its reliability by cross examination. Where the evidence is such that its reliability is virtually beyond question, eg certain business records, it cannot be said to be unfair not only to admit but also to rely on it to prove a particular ingredient of an offence. The evidence revealed by the facts in DPP v Myers 1965 AC 1001 was highly reliable. To prevent a conviction because proof of the vehicles in question depends on hearsay would seem to be absurd. Yet were the recorders of the chassis numbers identifiable?

Leaving aside issues of fairness, it seems that art.6(3)(d) does not apply to evidence of this nature since it does not come into being as part of the criminal investigation process (see paras. 5.9 and 5.10)

(c) Miscellaneous. Outside these general categories it is not difficult to imagine other situations in which it would seem to be unfair not to admit the evidence and yet the evidence would be excluded by the proposed rule. For

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instance, in a rape case the victim has since died and the only issue in dispute is lack of consent. The victim made a statement before she died. In addition independent witnesses have heard her screams and there is forensic evidence, but this evidence, while persuasive, is not specific enough in time and place to constitute adequate corroboration. The new proposal would seem to prevent a conviction. Would the victim be regarded as a "witness" for the purposes of art. 6 in these circumstances? If in this example the defendant had confessed, would that be capable of constituting corroboration under the proposal. In other words, can one piece of uncorroborated hearsay corroborate another piece of uncorroborated hearsay?

In all the above instances the effects of the proposed new rule would be severe, and we would argue that it is by no means clear that human rights law would be against the admission of such evidence. We consider that if any new rule concerning unsupported hearsay is to be introduced there is scope for making it much narrower than the present proposal while still being within the Convention.

8. Interruptions to prevent hearsay.

The Commission proposes a partial solution by allowing facts already admitted in direct evidence to be given as hearsay evidence. The Department does not believe that this will prevent interruptions but rather it will lead to more arguments as to what is already in evidence and what is not. Where a witness statement contains hearsay Counsel will know what is likely to emerge and can deal with it accordingly. Where it is unknown, the situation will not be resolved any more easily under the proposed law, because it will need to be established whether the proposed hearsay remark has been adduced in evidence directly yet or not. In addition, it may be a remark that a subsequent witness can prove the truth of but on which evidence has not been given and tested yet. The reality of interruptions is that Counsel often does not know whether they are dealing with hearsay or not. Many Counsel never consider whether evidence is intended to establish the truth of its contents or to prove that it was said. We believe that the new proposals will lead only to more wrangling over what are predominantly side issues.

9. Different reforms For Prosecution and Defence?

The Department is of the opinion that the same rules on hearsay should apply to the defence as to the prosecution. The system is already properly weighted in favour of the defence in order to prevent the conviction of innocent defendants through the different burdens and standards of proof. In addition, there is greater provision for the exclusion of prosecution evidence.

B. OTHER RELATED TOPICS

1. Previous Consistent Statements.

The Department supports the proposals, but we have a concern

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about the issue of discretion. It seems that the proposals for previous statements will constitute a different exception under the hearsay rule. How will this fit in with the proposals in option 7? In particular will this category of hearsay be automatically admitted? We consider that if judges had a discretion they would use it sparingly, mindful that the main concern in admitting previous statements is to avoid burdening the jury with paper the contents of which they have to assess when they should be concentrating on the evidence from the witness box. Earlier in this response we have proposed that judges have a discretion to exclude evidence which is misleading, confusing or wastes the court's time. We think that such a discretion would be helpful in this context as well.

2. Computer Evidence.

The Department strongly supports the proposals to repeal section 69 of PACE.

3. Expert Evidence.

Experts often rely on assistants to do much of the ground work for them. The Department considers that where results of base fact finding are recorded in writing section 24 can be sought to be relied on. Under the other proposals in the paper, such evidence would be admitted subject to the judge's discretion under s78 or the common law. Where any opinion of an assistant is relied on that individual should be available to cross examine.

It may be that this will be sufficient to deal with the difficulties that have been encountered, but it is not possible to know at this stage how judge's will use their discretion under s78 and the common law once ss25 and 26 are abolished. In these circumstances we are attracted by option 3. This would require expert witnesses to list the assistants and the tasks performed by each of them. Leave would have to be sought for any given assistant to be called. The Law Commission`s concern is that this requires the defence to disclose part of their case to secure the leave of the judge for a given assistant to be called. However, given that any defence expert evidence must be served in advance, it may impinge little on that non disclosure right.

We believe that the Law Commission`s preferred option whereby a further exception be introduced allowing for the admissibility of information relied on by an expert where it is provided by a person who cannot be expected to have any recollection of the matters stated is already covered by its proposed reformulation of s24.

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