



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 27 - Part I

**The Admissibility in Evidence of Computer
Records and Other Documentary
Statements**

REPORT

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The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1978*.

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CHARTER 1

INTRODUCTION

Terms of reference

1.1 The Commission was asked to consider and report on what provision, if any, should be made for the admissibility in court proceedings of records produced by computers. It was also asked to consider whether ss. 79B to 79E of the *Evidence Act 1906-1979*,¹ which relate to the admissibility of documentary statements, should be revised in view of reforms made in other jurisdictions.²

The Working Paper

1.2 In May 1978, the Commission issued a working paper³ to inform the public of the issues involved in the project and to elicit comment on those issues. The names of the organisations which submitted comments are listed in Appendix I to this Report.

Overview of the existing law

1.3 Generally, all evidence which is relevant to a matter in dispute in a court proceeding is admissible. However, as a result of the hearsay rule some relevant oral and documentary statements are inadmissible. In *Phipson on Evidence* the hearsay rule is formulated as follows:⁴

¹ These sections are reproduced in Appendix III of this report. The *Evidence Act 1906-1979* is referred to in this report as “the Evidence Act”.

² The Commission has also been asked to consider and report on:
“...whether and in what circumstances ‘reproductions’ of existing documents should be admitted in evidence and the methods by which ‘reproductions’ can be produced.”

The matters raised by these terms of reference are being considered as a second part of this Project. A working paper will be issued as soon as research has been completed.

³ Law Reform Commission of Western Australia, *Admissibility in Evidence of Computer Records and Other Documents*, referred to in this report as “the Working Paper”. Because of its length, the Commission, for practical reasons, has departed from its usual practice of attaching the Working Paper as an appendix to its report. Any person who wishes to study it may obtain a copy, free of charge, at the Commission’s office.

⁴ *Phipson on Evidence* (12th ed., 1976) at 263. A statement made by a person who is not called as a witness may, however, be admissible for some other purpose, for example, to prove that the statement was made. This may be relevant in showing the mental state and subsequent conduct of a person in whose presence the statement was made: see *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 970.

“Former statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them”.

This formulation of the rule includes the rule that a witness’s own prior out-of-court statements are inadmissible as evidence of the truth of their contents. Other formulations treat these rules as separate. For the purpose of the Commission’s reference it is unnecessary to distinguish the rules as the result in any case is the same.⁵

1.4 A number of reasons have been advanced for excluding relevant evidence under the hearsay rule. The most important of these is that, unless the maker of the statement is called as a witness, the statement cannot be tested by cross-examination to expose any faults in perception, memory or understanding and any want of truthfulness or sincerity on the part of the maker of the statement. Other reasons which have been advanced are that -

- (a) such statements are not made on oath and the maker of the statement is not liable to prosecution for perjury;⁶
- (b) the admission of such statements might lead to the admission of manufactured or fabricated evidence; and
- (c) the admission of such statements would permit the multiplication of evidence, the investigation of side issues and the admission of evidence which it might be hard for a party to anticipate and deal with effectively.

1.5 Although these reasons provide some justification for the exclusion of relevant evidence, the rule has disadvantages. The major disadvantage is that it might lead to injustice if a potential witness is dead or cannot be called for some other reason and the facts cannot be proved except by tendering evidence of that person’s prior statements. The hearsay rule may also unduly add to the cost of proving the facts in issue in a trial if, for example, the maker of the statement is out of the State and has to be brought to Western Australia.

⁵ See *Cross on Evidence* (2nd Aust. ed., 1979) at 225, and the Report of New South Wales Law Reform Commission on *The Rule Against Hearsay* (1978) at 30.

⁶ Unless, of course, the statement was made in a former court proceeding.

1.6 As a result of these difficulties a number of common law and statutory exceptions to the rule excluding hearsay statements, including former statements of witnesses, have been developed.⁷ Amongst the common law exceptions to the hearsay rule are certain statements made by deceased persons,⁸ statements in public documents and a

Suggested implementation of the Commission's recommendations

1.9 Appendix II to this report contains the Commission's suggested draft of legislation to incorporate the Commission's recommendations on the admissibility of documentary statements. The Commission recognises, however, that its recommendations may be implemented in other ways and by different drafting techniques. The Commission would be available to liaise with Parliamentary Counsel on this matter.

Acknowledgements

1.10 In preparing the Working Paper and Report the Commission received assistance from the Branch Manager in Western Australia of IBM Australia Limited, the Managers of the Financial and Government Group and the Data Centre of NCR Australia Pty. Ltd. and the Managers of the Electronic Data Process Centre and the Bankcard Centre of the Rural and Industries Bank of Western Australia. The Commission is grateful to all these people for their assistance. The Commission also expresses its thanks to those organisations which submitted comments on the Working Paper.

CHAPTER 2 THE PRESENT LAW

Civil proceedings

2.1 In civil proceedings a documentary statement¹ is admissible under s.79C of the *Evidence Act* if the maker of the statement either had personal knowledge of the matters dealt with by the statement or, in so far as he did not, he made the statement in the performance of a duty to record information supplied, whether directly or indirectly, by a person who had, or may reasonably be expected to have had, personal knowledge of the matters dealt with in the information he supplied.²

2.2 In any such case, the maker of the statement must be called as a witness³ unless -⁴

- (i) he is dead;
- (ii) he is bodily or mentally unfit to attend;
- (iii) he is out of the State and it is not reasonably practicable to secure his attendance;
- (iv) all reasonable efforts to identify or find him have been unsuccessful; or
- (v) the other party does not require his attendance.

2.3 The court has a discretion to admit a statement notwithstanding that it is tendered by the party calling the maker of it; or that the maker of the statement is available but not called as a witness; or that the original document is lost, destroyed, or mislaid, provided a true copy is produced in its place.⁵

2.4 The party tendering the statement in evidence does not have an absolute right to have it admitted if the requirements of the section are met, for the court may nevertheless exclude the statement if it would be inexpedient in the interests of justice to admit it.⁶ Section 79D(2) provides that a statement rendered admissible by s.79C is not to be treated as corroboration of evidence given by the maker of the statement. Section 79D also lays down guidelines to be

¹ This includes a representation of fact or opinion: *Evidence Act 1906-1979*, s.79B(b).

² *Id.*, s.79C(1)(a).

³ *Id.*, s.79C(1)(b).

⁴ *Id.*, s.79C(2).

⁵ *Id.*, s.79C(3). These discretions are discussed in paragraphs 2.10 and 2.11 below.

⁶ *Evidence Act 1906-1979*, s.79C(4).

taken into account by the court in estimating the weight to be attached to a statement rendered admissible by s.79C.⁷

may be admitted notwithstanding that the original document is lost, destroyed or mislaid, provided a true copy is produced in its place. This discretion is both understandable and reasonable. The other two situations are more difficult to understand. The first provides the court with a discretion to admit a statement notwithstanding "... that the statement is tendered by the party calling the maker of the statement". The provision of such a discretion is difficult to understand because the party tendering the statement is required, as a condition of admissibility, to call the maker of the statement. Possibly it is intended to overcome the common law rule that a previous statement cannot be admitted in examination-in-chief on the application of the party calling the witness.¹³ However instead of providing expressly that a statement is admissible notwithstanding that it is tendered by the party calling the maker, the provision merely gives a discretion to the court to admit it. Accordingly, if the court rules against admission, the party attempting to tender the statement may be disadvantaged, particularly if the maker has little or no recollection about it.

2.11 In the second situation the court has a discretion to admit a statement notwithstanding "... that the maker of the statement is available but is not called as a witness". This appears to give the court a discretion to admit a statement without the maker of the statement being called as a witness even though one of the circumstances listed in s.79C (2)¹⁴ has not been met.

Criminal proceedings

2.12 In criminal proceedings, s.79E of the *Evidence Act* provides that a documentary statement is admissible as evidence of the matters dealt with by it if it is, or forms part of, a record relating to any trade or business. The record must be compiled in the course of that trade or business from information supplied, whether directly or indirectly, by a person who had or may reasonably be supposed to have had personal knowledge of the matters dealt with in the information which he supplied.

2.13 A statement in a record relating to any trade or business is, however, only admissible if the person who supplied the information recorded in the document is -¹⁵

¹³ See the English Law Reform Committee, *Thirteenth Report* (Cmnd. 2964, 1966), paragraph 8.

¹⁴ See paragraph 2.2 above.

¹⁵ *Evidence Act 1906-1979*, s.79E(1)(b).

- (i) dead;
- (ii) beyond the seas;
- (iii) bodily or mentally unfit to attend;
- (iv) cannot be identified or found with reasonable diligence;
- (v) cannot reasonably be expected to have any recollection of the matters dealt with in the information he supplied.

do not fall within this class,¹⁸ even though the section gives an extended meaning to “business” which includes:¹⁹

“... any public transport, public utility or similar undertaking carried on by the Crown or a statutory body and also includes any municipality.”

It is anomalous that a statement in a record of a doctor in private practice would be admissible under the same section. As a result of this type of problem, some jurisdictions in Australia have adopted an even wider definition of “business”. The Commission, however, considers that any attempt to distinguish “business” from “non-business” records results in arbitrary distinctions both as to what is a record and what is a business. In the Commission’s view it is

CHAPTER 3

RECOMMENDATIONS

INTRODUCTION

3.1 This chapter contains a discussion of the Commission's recommendations on whether or not records produced by computers should be admissible and on the conditions of admissibility which should be provided for documentary statements in civil and criminal proceedings. There is also a discussion of the ancillary and safeguard provisions which the Commission recommends should be provided.

RECORDS PRODUCED BY COMPUTERS

3.2 In 1976, a Committee appointed by the Western Australian Government to examine the question of privacy and data banks found that 12% of records kept by Western Australian Government departments and instrumentalities were recorded on computer files.¹ Government departments and instrumentalities, local government bodies, and private organisations (such as banks, building societies, insurance companies and other businesses) are increasingly using computers to record information. As a result, the Commission has no doubt that the question of whether or not records produced by computers should be admitted in legal proceedings as evidence of the truth of the matters asserted in them will assume increasing significance.

3.3

documentary records it is seldom that the only available evidence of the assertion would be the record. Even if it were, the courts can be relied upon to assess the weight to be given to it.

BUSINESS RECORDS

3.5 In the Working Paper, the Commission suggested that the existing law should be revised by making separate provision for the admissibility of business records on the one hand and other documentary statements on the other. The Commission discussed³ two possible approaches. Under the first, specific provision would be made for the admissibility of records

distinction has been made by providing a definition of “business”. However, “business” has been defined so widely in an attempt to include all bodies which have regular systems of record keeping that it has ceased to be a significant distinction. For example, in Victoria business is defined as including:⁷

“... public administration and any business profession occupation calling trade or undertaking whether engaged in or carried on by the Crown, or by a statutory authority, or by any other person, whether or not it is engaged in or carried on for profit”.

Notwithstanding such a wide definition, the business records approach can lead to anomalies because the definition may not include, for example, local government authorities, intergovernmental or international organisations.

3.9 In the New South Wales and Commonwealth legislation which adopts this approach, a business record may be produced in civil proceedings without calling the person who made the statement in the record or supplied the information recorded in it provided that the statement was made by a qualified person. It is the Commission’s view that it is important that the person who made the statement or supplied the information contained in the statement should be available for cross-examination wherever possible rather than allowing the document to be admitted merely because it comes within a defined category.

CONDITIONS OF ADMISSIBILITY

Civil proceedings

3.10 As was foreshadowed in paragraph 1.8 above, the Commission now considers that the best approach to reform would be to amend s.79C of the *Evidence Act*. The Commission’s recommendations are discussed below. In making these recommendations, the Commission has avoided distinctions between records produced by computers and other business records, and between business records and other documentary statements.

3.11 At present, documentary statements are admissible in two circumstances under s.79C. In the first circumstance it must be shown that the statement was “made by a person in a document” and that that person had personal knowledge of the matters dealt with in the re.

statement. Alternatively, where the maker of the statement does not have personal knowledge of the matters dealt with by the statement, he must have made the statement in the performance of a duty to record information supplied, whether directly or indirectly, by a person who had, or may reasonably be expected to have had, personal knowledge of the matters dealt with in the information he supplied. In either case the maker must be called as a witness except for one of a number of prescribed reasons.

3.12 The Commission considers that it is desirable to revise s.79C so as to -

- (a) avoid the need to show that the statement recorded by an intermediary was recorded pursuant to a duty;⁸
- (b) require the ultimate supplier of the information to be called as a witness, rather than the intermediary; and
- (c) overcome the doubt whether or not computer records are admissible under the section because of the complex nature of their compilation.⁹

3.13 The Commission has drafted a provision which is designed to give effect to these changes to the section.¹⁰

3.14 Although many documentary statements will be admissible under the revision of s.79C proposed by the Commission, one class of documentary statements would not be admissible under it because the information recorded in the document is not information which has been supplied by a person, but reproduces or is derived from information automatically counted, measured, recorded or identified by a machine ("machine information"). For example, at the Land Titles Office, a device incorporating a clock is used to record on documents (such as a transfer of land) the time at which the documents are presented for registration. Machines, in association with computers, are also being used to despatch goods ordered by a person. In one such system being used by a local co-operative an order for groceries from a member is fed into a computer and the computer selects the

conveyor belt and the groceries are collated and wrapped for despatch to the member. The

definition is preferable to the existing definition and therefore recommends that “document” should be defined as including, in addition to a document in writing: ¹⁴

- “(i) any book, map, plan, graph or drawing;
- (ii) any photograph;
- (iii) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being produced therefrom;
- (iv) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
- (v) any other record of information whatever”.

3.17 The condition that the maker of the statement must be called as a witness need not be satisfied at present if - ¹⁵

- (a) he is dead;

maker should be extended. The Commission accordingly recommends that the requirement that the maker of the statement must be called as a witness need not be satisfied if - ¹⁷

- (a) having regard to the time which has elapsed since he made the statement and to all the circumstances he cannot reasonably be expected to have any recollection of the matters dealt with in the statement;
- (b) having regard to all the circumstances of the case, undue delay inconvenience or expense would be caused by calling him as a witness;¹⁸
- (c) he is compellable to testify but refuses to be sworn.¹⁹

3.18 One particular matter considered in the Working Paper was whether a record in a system designed to keep a record of the happening of all events of a particular description, for example, a periodic rent payment, should be admissible to prove that a particular event of that description did not happen. The position is not clear, but such a record may not be admissible because it is hearsay evidence.²⁰

3.19 The Law Society of Western Australia, which was the only commentator to advert to the matter, considered that express provision should be made for the admissibility of evidence of the absence of a record or entry. Such a provision would clarify the law relating to the proof of a negative fact.²¹ The Commission considers that it is desirable to clarify the law on

¹⁷ In view of this expansion of the grounds upon which the maker need not be called as a witness the Commission sees no reason to retain any general09 needd cl065s 0 e grounany the Ws.79C(3)

this matter and recommends that a provision along the lines of one in New South Wales be enacted in Western Australia.²²

Criminal proceedings

3.20 As can be seen from the discussion of the existing law in the previous chapter, the conditions of admissibility of documentary statements at present are different in civil and criminal proceedings. This distinction has existed since 1967 when s. 79C (which relates to civil proceedings) and s. 79E (which relates to criminal proceedings) were enacted. Both sections were based on legislation in England at that time. Section 79E was based on the *Criminal Evidence Act 1965* (Eng.). That Act was enacted in order to overcome the difficulties created by the decision in the case of *Myers v Director of Public Prosecutions*²³ pending a review of the law of evidence in criminal proceedings by the Criminal Law Revision Committee. The Committee made its recommendations in 1972.²⁴ It recommended that hearsay evidence should be admissible in criminal proceedings in circumstances comparable to those in civil proceedings under the *Civil Evidence Act 1968* (Eng). The report has not, as yet, been implemented. The *Civil Evidence Act 1968* (Eng) widened substantially the circumstances in which out-of-court statements could be admitted in evidence in civil proceedings.²⁵

3.21 In paragraphs 3.10 to 3.19 above, the Commission made recommendations as to the admissibility of documentary statements in civil proceedings. The question arises whether documentary statements should be admissible in criminal proceedings in the same circumstances. The position in criminal proceedings must be carefully considered because -

- (i) the admission of documentary statements departs from the traditionally oral of

- (ii) there is a need to ensure that as far as practicable allegations are tested by cross-examination; and
- (iii) there is a need to avoid the danger that fabricated evidence could be presented which would be sufficient to raise a reasonable doubt in an otherwise hopeless case, or to strengthen a weak prosecution case.

As there are no interlocutory proceedings, such as discovery and inspection, in criminal trials, there is a greater danger that one party will be surprised by the tendering of a documentary statement by the other party.²⁶ This danger can be mitigated in civil proceedings by interlocutory proceedings or by an adjournment of the trial. In criminal trials, particularly those involving a jury, there may be more reluctance on the part of the court to grant an adjournment and any adjournment is likely to be shorter than would be the case in civil proceedings.

3.22 While the Commission is mindful of the difficulties associated with the admissibility of documentary statements in criminal proceedings, the Commission considers that, so far as possible, the rules of evidence in civil and criminal proceedings should be the same. The Commission has not had drawn to its attention any significant problems which have arisen from the admission of documentary statements in criminal proceedings under s.79E of the *Evidence Act*

- (ii) the admission of evidence as to the credibility of the person who made the statement.³¹

A safeguard which specifically relates to criminal proceedings which the Commission recommends is -

- (iii) an exclusion of statements made or recorded for the purpose of or in contemplation of criminal proceedings save for circumstances in which such statements are admissible other than pursuant to the provisions of the section.³²

Apart from these safeguards, the judge in a trial has considerable scope to comment on evidence in his direction to the jury.³³

3.23 The Commission therefore recommends that, save for safeguard (iii) referred to in the previous paragraph, a documentary statement should be admissible in criminal proceedings in the same circumstances as in civil proceedings. Consequently, it recommends that s.79E of the *Evidence Act* be repealed and replaced by the proposed new provisions which deal with both criminal and civil proceedings.

SAFEGUARDS AND ANCILLARY PROVISIONS

Introduction

3.24 In providing for the admissibility of documentary statements in civil and criminal proceedings it is necessary to enact certain safeguards and ancillary provisions. The Commission's recommendations in this respect are discussed below. A number of these are already provided for in ss.79C, 79D and 79E of the *Evidence Act*. The others are modifications of existing provisions or provisions elsewhere.

³¹ See paragraphs 3.27 and 3.28 below.

³² See paragraph 3.32 below.

³³ See *R. v Mawson* [1967] VR 205 at 208 and 209.

Weight to be attached to evidence

3.25 At present, in estimating the weight, if any, to be attached to a statement admissible as evidence under s.79C it is necessary to have regard to all the circumstances from which any inference can be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and whether or not the maker of the statement had any

Discretion to exclude a statement

3.31

and it recommended that a judge should have such a power.⁴³ A judge could then determine whether it was desirable for the jury to have the documents with them during their deliberations.⁴⁴ In a complex fraud case, for example, it might be desirable for a jury to have the documents with them during their deliberations. On the other hand, the judge might consider that this course was undesirable if he considered that the jury might give undue weight to the statements in the documents. The Commission considers that it is desirable for courts in Western Australia to have such an express power and recommends accordingly.

Inferences

3.34 At present, a court, in deciding whether or not a statement is admissible, may draw any reasonable inference from the form or contents of the document in which the statement is contained.⁴⁵ The Commission considers that such a power is desirable and recommends that this provision be retained.

Production of documents in court

3.35 At present, a statement otherwise admissible under s.79C is admissible notwithstanding that the original document has been mislaid or destroyed, or is not produced, if in lieu of it there is produced a copy of it or of the material part of it certified to be a true copy.⁴⁶ The Commission recommends that such a power be retained, though in a different form.⁴⁷

3.36 The Commission also recommends that provision be made for the production of statements recorded in non-legible form, for example on film, discs or tapes, by their display or reproduction in a form which is intelligible to the court.⁴⁸

empowered to require that the original film, disc or tape be made available to the other party for examination or testing.⁴⁹

Medical certificate

3.37 A court may also, in determining whether or not a person is fit to attend as a witness, act on a medical certificate purporting to be the certificate of a registered medical practitioner.⁵⁰ The Commission considers that this provision should be retained.

⁴⁹ See clause 79F(4) of Appendix II.

⁵⁰ Evidence Act 1906-1979, ss.79C(4) and 79E(2).

CHAPTER 4 OTHER MATTERS

BANKERS' BOOKS

The present law

4.1 In both civil and criminal proceedings s.89 of the *Evidence Act* provides that, subject to the provisions of the Act, a copy of an entry in a banker's book is evidence of the entry and of the matters, transactions and accounts recorded therein. One purpose of the provision is "... to allow copies of entries in bankers' books to be received to overcome the inconvenience which would occur if books in current use had to be brought to court".¹ It is not clear whether it goes further and provides that a copy is admissible as evidence of the facts contained it.² Windeyer J. has cast doubt on whether the provision is as wide as this.³

4.2 Before a copy of any entry in a bankers' book can be admitted⁴ it must be shown that-⁵

- (i) at the time of the making of the entry the book was one of the ordinary books of the bank;
- (ii) the entry was made in the usual and ordinary course of business; and
- (iii) the book is in the custody or control of the bank.

The fulfilment of these conditions may be proved, either orally or by an affidavit, by a partner or an officer of the bank.⁶

¹ Windeyer J. in *Elsey v Commissioner of Taxation* (Cwth) (1969) 43 ALJR 415 at 417.

² See *Myers v Director of Public Prosecutions* (1964] 2 All ER 881 at 890 and 892.

³ *Elsey v Commissioner of Taxation* (Cwth) (1969) 43 ALJR 415 at 417.

⁴ A banker or an officer of the bank cannot be compelled to produce any banker's book or to appear as a witness with regard to the transactions and accounts recorded therein where the bank is not a party to the legal proceeding except by order a judge of the Supreme Court: *Evidence Act 1906-1979*, s.93. This power may also be exercised by a judge of the District Court or Family Court of Western Australia, a stipendiary magistrate and any justice of the peace on the investigation of complaints of indictable offences: *ibid.*, s.96.

⁵ *Evidence Act 1906-1979*, s.90(1).

⁶ *Id.*, s.90(2). It is still possible for a bank to be formed and operated by a partnership: see s. 11 of the *Banking Act 1959-1979* (Cwth).

4.3 An officer of a bank who has examined the banker's books may either orally or by an affidavit, give evidence as to the state of an account, or that a person does not have an account, or have any funds to his credit, without production of the books.⁷

4.4 Another problem with the provisions is that the definition of "bankers' books" may not cover modern methods of recording information.⁸ The definition is based on legislation enacted in the United Kingdom in 1879⁹ and consequently emanates from a time when records were kept in hand-written bound books. As the definition is in terms of "books" it may not include loose-leaf ledgers or accounts produced as part of a computer process.

Recommendations

4.5 There are therefore two aspects of the existing law which are unclear. First, it is not altogether clear whether copies of bankers' books are admissible as evidence of the truth of the statements contained in them. Secondly, the definition of "bankers' books" may not include modern methods of recording information such as loose-leaf ledgers and computers.

4.6 The second part of this project is concerned with the admissibility in evidence of reproductions.¹⁰ The law relating to the admissibility of copies of bankers' books will be reviewed as a part of that project. In the meantime, however, the Commission considers that the existing provisions in the *Evidence Act* should be clarified. As to the first area of doubt, the Commission considers that the only purpose of the provisions should be to enable a copy of an entry in bankers' books to be tendered in court to avoid the inconvenience of having to tender books in current use. Whether or not a particular statement in a book is admissible as evidence of the facts contained in it should be determined in accordance with the conditions of admissibility of documentary statements. The Commission therefore recommends that the provisions relating to bankers' books should be amended so as to make it clear that they are merely a means of facilitating the production in court of copies of bankers' books. The Commission notes that the *Credit Unions Act 1979* provides a simple procedure for producing

⁷ *Evidence Act 1906-1979*, s.92.

⁸ "Bankers' Books" is defined in s.3 of the Evidence Act as including:
 "...ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank".

But see *Barker v Wilson* The Times 5 February 1980 at 11 where an identical definition was held to include a record kept on microfilm.

⁹ The *Bankers' Books Evidence Act 1879*, 42 and 43 and Vict., C.11.

¹⁰ See footnote 2 in Chapter 1.

the word “document”. The Commission is not aware of any case referring specifically to a computer memory or to tapes, discs or cards. In Australia it has been held that video tapes¹⁹ and tape recordings²⁰ are not documents.

In England, however, tape recordings²¹ and cinematograph film²² have been held to be documents.

Recommendations

4.11 It is the Commission’s view that it is desirable that the existing law be clarified and brought into accord with modern conditions so that the modern means of recording information referred to above are subject to the interlocutory proceedings of the Supreme Court, the District Court and the Local Courts. This could be done by providing a wide definition of “document”.²³

4.12 However, merely to provide such a definition would not ensure that the interlocutory proceedings would operate effectively in relation to these modern documents. For instance, as a visual inspection of computer tapes, discs or cards would be useless for the purpose of determining their contents,²⁴ the rules with regard to inspection do not appear to be appropriate. The Commission recommends that the rules of court should make provision for the inspection of any such document by a print-out in a legible form.²⁵ The Commission also recommends that the rules of court should make provision for an order to be made requiring a

¹⁹ *Nicholls v McLeay and Herald - Sun T.V. Pty. Ltd.* (1971) 1 SASR 442.

²⁰ *Oswin v Radio 2UE Sydney Pty. Ltd.* [1968] 1 NSW 461; *Beneficial Finance Corp Co. Ltd. v Conway* [1970] VR 321; but cf. *Cassidy v Engwirda Construction Co.* [1967] QWN 16.

²¹ *Grant v Southwestern and County Properties Ltd.* [1974] 2 All ER 465.

²² *Senior v Holdsworth* [1975] 2 All ER 1009.

²³ For example, in paragraph 3. 16 above the Commission recommended that the term “document” should be defined as including, in addition to a document in writing -

(i) any book, map, plan, graph or drawing;

(ii) any photograph;

(iii) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being produced therefrom;

(iv) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and

(v) any other record of information whatever.

²⁴ Visual inspection might be useful in determining whether a tape had been interfered with.

²⁵ Order 66 rule 47(4) of the *Supreme Court Rules 1971-1980*, which provides that “. . . the costs of obtaining discovery including inspection of documents is in the discretion of the Taxing Officer . . .”, probably provides a satisfactory means of assessing the costs of such a discovery and inspection.

copy, reproduction or print-out to be made under the direction of the Court and providing for the costs of doing so.

4.13 Under Order 36 rule 11 of the *Supreme Court Rules 1971-1980*, the Court may order that any person attend the Court for the purpose of “. . . producing any writings or other documents named in the order which the Court may think fit to be produced . . .”. It would appear to be desirable to enable the Court to make an order for the reproduction of information in a computer’s memory or on computer discs, tapes or cards in a legible form. This would also be necessary in criminal proceedings.²⁶

²⁶ See for example s.78 of the *Justices Act 1902-1979* where a witness may be compelled to produce “documents and writings in his possession or power”.

- (f) having regard to the time which has elapsed since he made the statement and to all the circumstances he cannot reasonably be expected to have any recollection of the matters dealt with in the statement;
- (g) having regard to all the circumstances of the case, undue delay, inconvenience or expense would be caused by calling him as a witness; or
- (h) he is compellable to testify but refuses to be sworn.

(paragraph 3.17 and clause 79C(2) of
Appendix II)

3. In civil and criminal proceedings a documentary statement should be admissible if it, directly or indirectly, reproduces or is derived from information from one or more devices designed for and used for the purpose of recording, measuring, counting or identifying information not being information based on a statement made by any person.

(paragraphs 3.14, 3.15 and 3.20 to 3.23, and
clause 79C(1)(b)(ii) of Appendix II)

Safeguard and ancillary provisions

4. Provision should be made for the following safeguard and ancillary provisions -

- (a) weight to be attached to the evidence;
(paragraphs 3.25 and 3.26, and clause 79D(1)
of Appendix II)
- (b) credibility of the person responsible for the statement;
(paragraphs 3.27 and 3.28, and clause 79D(3)
of Appendix II)
- (c) corroborative evidence;
(paragraphs 3.29 and 3.30, and clause 79D(2)
of Appendix II)
- (d) discretion to exclude a statement;

(paragraph 3.31 and clause 79C(5) of
Appendix II)

- (e) statements made or recorded for the purpose of or in contemplation of criminal proceedings;
(paragraph 3.32 and clause 79C(4) of Appendix II)
- (f) withholding documents from a jury;
(paragraph 3.33 and clause 79D(4) of Appendix II)
- (g) inferences;
(paragraph 3.34 and clause 79C(5) of Appendix II)
- (h) production of documents in court; and
(paragraphs 3.35 and 3.36, and clause 79F of Appendix II)
- (i) production of a medical certificate.
(paragraph 3.37 and clause 79C(5) of Appendix II)

Absence of a record of an entry

5. The Commission considers that express provision should be made for the admissibility of evidence of the absence of a record or entry. Under this recommendation, a record in a system designed to keep a record of the happening of all events of a particular description, for example, a periodic rent payment, would be admissible to prove that a particular event of that description did not happen.

(paragraphs 3.18 and 3.19, and clause 79E of Appendix II)

Bankers' books

6. At present, a copy of an entry in a banker's book is evidence of the entry and of the matters, transactions and accounts recorded therein. It is not clear whether such a copy is admissible as evidence of the facts contained in it. The Commission recommends that the provisions relating to bankers' books be amended so as to make it clear that they are merely a means of facilitating the production in court of copies of bankers' books. Whether or not a particular statement in a book is admissible as evidence of the facts contained in it, should be determined in accordance with the conditions of admissibility of documentary statements.

(paragraph 4.6)

7. The Commission also recommends that the definition of "bankers' books" should be amended to ensure that modern methods of recording information by banks, including computers, are not excluded from the provisions relating to bankers' books.

(paragraph 4.7)

Discovery, inspection and production of computer records

8. At present, it is not clear whether the rules of court relating to the discovery, inspection and production of documents apply to records maintained by computers and stored in an internal memory or on material such as tapes, discs or cards. Whether or not the rules apply to such records depends on the interpretation of the word "document". The Commission recommends that the law be clarified and brought into accord with modern conditions by providing a wide definition of "document" which includes the modern means of recording information referred to above.

(paragraph 4.11)

9. As a mere visual inspection of computer tapes, discs or cards would be useless, the Commission recommends that the rules of court should make provision for the inspection of any such document by a print-out in a legible form.

(paragraph 4.12)

(Signed) David K. Malcolm
Chairman

Eric Freeman
Member

H. H. Jackson
Member

Charles Ogilvie
Member

L.L. Proksch
Member

15 July 1980

APPENDIX I

List of those who commented on the Working Paper

Associated Banks in W.A.

Bureau of Consumer Affairs

Insurance Council of Australia

The Law Society of Western Australia

APPENDIX II

**Suggested implementation of the Commission's recommendations
on the admissibility of documentary statements**

had or may reasonably be supposed to have had personal knowledge of the matters dealt with by the statement or in a case where the statement is not admissible in evidence unless made by an expert on the subject of the statement he was such an expert;

(e)

- (b) he is unfit by reason of his bodily or mental condition to attend or testify as a witness;
- (c)

consistent or inconsistent with the statement; or

- (d) that the statement is in such a form that it would not be admissible if given as oral testimony, but does not make admissible a statement which is otherwise inadmissible.

(4) In any criminal proceeding, notwithstanding that the conditions of admissibility contained in subsections (1) and (2) of this section have been met, a statement contained in a document which was made or recorded in the course of or for the purpose of -

- (a) the investigation of facts constituting or being constituents of the alleged offence being dealt with in the proceeding;
- (b) an investigation which led to the discovery of facts constituting or being constituents of the alleged offence;
- (c) the preparation of a defence to a charge for any offence; or
- (d) the preparation of the case for the prosecution in respect of any offence; -s13of

reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

Ancillary Provisions

79D. (1) In estimating the weight, if any, to be attached to a statement admissible as evidence by virtue of section 79C regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular -

- (i) to the question whether or not the qualified person made the statement contemporaneously with the occurrence or existence of the facts stated;
- (ii) to the question whether or not the qualified person, or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts;
- (iii) to the question whether or not the information was collected systematically;
- (iv) to the question whether or not the information was collected pursuant to a duty to do so;
- (v) in the case of a statement wholly or in part reproducing or derived from information from one or more devices, to the reliability of the device or devices; and
- (vi) in the case of a statement reproducing or derived from any information, to the reliability of the means of reproduction or derivation.

This is a new provision. Clauses 79D(1)(i) and (ii) are based on ss.79D(1) and 79E(3) of the *Evidence Act 1906-1979*. Clauses 79D(1)(iii)-(vi) are additional factors which the Commission considers should be taken into account: see paragraphs 3.25 and 3.26 of the Report.

Clauses 79D(1)(iii) and (iv) are new provisions.

Clauses 79D(1)(v) and (vi) are based on s.14CI(b) and (c) of the *Evidence Act 1898-1979* (NSW).

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by virtue of section 79C shall not be treated as corroboration of the evidence given by the qualified person.

This provision is at present in s. 79D(2) of the *Evidence Act 1906-1979*: see paragraphs 3.29 and 3.30 of the Report.

(3) (a) Where in any proceeding a statement is given in evidence by virtue of section 79C, but the qualified person is not called as a witness in the proceeding -

This is a new provision. It is based on s.55A of the *Evidence Act 1958-1978 (Vic)*: see paragraphs 3.27 and 3.28 of the Report.

- (i) any evidence which, if that person had been so called, would be admissible for the purpose of destroying or supporting his credibility as a witness shall be admissible for that purpose in those proceedings;
- (ii) any evidence tending to prove that, whether before or after he made that statement, he made another statement (whether orally or in a document or otherwise) inconsistent therewith shall be admissible for the purpose of showing that he has contradicted himself -

but nothing in paragraphs (i) or (ii) shall enable evidence to be given of any matter of which, if the person in question had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

(b) Where in any proceeding a statement is given in evidence by virtue of section 79C, but the qualified person is not called as a witness in the proceeding any evidence proving that that person has been guilty of any indictable offence shall be admissible in the proceedings to the same extent as if that person had been so called and on being questioned as to whether he had been convicted of an indictable offence had denied the fact or did not admit the fact or refused to answer the question.

(4) Where in a proceeding there is a jury, and a statement in a document is admitted in evidence under section 79C, and it appears to the court that if the jury were to have the document with it during its deliberations it might give the statement undue weight, the court may direct that the document be withheld from the jury during its deliberations.

This is a new provision. It is based on s. 14CQ of the *Evidence Act 1898-1979* (NSW): see paragraph 3.33 of the Report.

Dispute as to the happening of an event

79E. (1) Where in any proceeding the happening of an event of any description is in question, and a system of record keeping has been followed to make and keep a record of the happening of all events of that description, oral or other evidence to establish that there is no record of the happening of the event in question is admissible to prove that the event did not happen.

This is a new provision. It is designed to enable a record in a system designed to keep a record of the happening of all events of a particular description to be admissible to prove that a particular event of that description did not happen: see paragraphs 3.18 and 3.19 of the Report. It is based on s.14CH of the *Evidence Act 1898-1979* (NSW).

(2) Where evidence is, or is proposed to be, tendered under this section, the court may require that the whole or part of the record concerned be produced and, in default, may reject the evidence or, if it has been received, exclude it.

(3) In estimating the weight, if any, to be attached to evidence admissible by virtue of this section, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the evidence including whether any person concerned with the system had any incentive to omit recording the happening of the event in question.

(4) The absence of a record of the happening of an event in a record of information made by the use of a computer or any other device for storing, recording or processing information may be proved by the production of a document produced by the use of a computer or other device containing a statement based on the absence of such a record.

APPENDIX III
EXTRACTS FROM THE EVIDENCE ACT 1906-1979

Interpretation.
Added by No.
69 of 1967,
s.2.

79B. In sections 79C and 79D of this Act -

- (a) “document” includes books, maps, plans, drawings and photographs, and any device by means of which information is recorded or stored;
- (b) “statement” includes any representation of fact or opinion whether made in words or otherwise;
- (c) “proceedings” includes arbitrations and references; and “court” shall be construed accordingly.

Admissibility
of certain
documentary
evidence as to
facts in issue.
Added by
No.69 of
1967, s.2.

79C. (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish the fact shall, on production of the document, be admissible as evidence of that fact -

- (a) if the maker of the statement either -
 - (i) had personal knowledge of the matters dealt with by the statement; or
 - (ii) made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied whether directly or indirectly by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied; and

(b) if the maker of the statement is called as a witness.

(2) The condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is out of the

(c) that the original document is lost or mislaid or destroyed, or is not produced, if in lieu of it there is produced a copy of it or of the material part of it certified to be a true copy in such a manner as may be specified in the order or as the court may approve, as the case may be.

(4) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner and the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

Weight to be attached to documentary evidence.
Added by No. 69 of 1967, s.2.

79D. (1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by section 79C of this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by section 79C of this Act shall not be treated as corroboration of evidence given by the maker of the statement.

Admissibility of certain trade or business records.
Added by No.69 of 1967, s.2.

79E. (1) In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if -

(a) the document is, or forms part of, a record relating to any trade or business and compiled, in the course of that trade or business, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and

(b) the person who supplied the information recorded in the statement in question is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the

Entries in
bankers
books.
Vict.,

- Verification of copy. 58 Vict., No. 6, s.5.
91. (1) A copy of an entry in a banker's book shall not be received in evidence unless it is further proved that the copy has been examined with the original entry and is correct.
- (2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by affidavit.
- Legal proceedings. Amended by No. 10 of 1960, s.3. See N.S.W., No. 11 of 1898, s.48.
92. In any legal proceedings in which it is necessary to prove -
- (a) the state of an account in the books of any bank; or
- (b) that any person had not an account or any funds to his credit in such books,
- it shall not be necessary to produce any such book, but evidence of the state of such account, or that no such account or funds existed, may be given either orally or by affidavit by any officer or clerk of such bank who has examined such book
- Application of sections 89 to 92 to banks. Added by No. 10 of 1960, s.4.
- 92A. The provisions of sections eighty-nine, ninety, ninety-one and ninety-two of this Act shall apply to bankers' books and banks and branches of banks of any State or Territory of the Commonwealth.
- Cases in which banker etc., not compellable to produce book, etc. 58 Vict., No. 6, s.6.
93. A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable -
- (a) to produce any banker's book, the contents of which can be proved under the provisions of this Act; or
- (b) to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a Judge of the Supreme Court made for special cause.
- Inspection of banker's books, see 58 Vict., No. 6 s.7.
94. (1) On the application of any party to a legal proceeding, the Court or a Judge of the Supreme Court may order that such party be at liberty to inspect and take copies of any entries in a banker's book relating to the matters in question in such proceeding.
- (2) An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank by delivering a copy of the order to an officer of such bank at a principal or a branch office thereof, having the custody of the book of which inspection is desired, three clear days before the same is to be obeyed, unless the Court or Judge otherwise directs.
- Ibid., s.11.
- (3) Sunday, Christmas Day, Good Friday, and any bank holiday shall be excluded from the computation of time under this section.

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Costs.
58 Vict.,
No. 6
s.8.

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Power of
judge
extended to
magistrates, etc.
Vict., No. 6,
s.9.
Amended by
No. 111
of 1978, s.5.

APPENDIX IV
WHAT IS A COMPUTER?

1. A computer is a device capable of storing, recording and processing ¹ information, and solving problems, in accordance with

the information and programme during processing. Information and programmes may be stored in an **external store** which, as the name suggests, is physically separated from the central processing unit. Information and programmes may be transferred between the store in the central processor and the external store.

5. Both stored and processed information may be retrieved at any time by means of an **output device**. There are various types of output device. Information may be printed out by machine printer or a teleprinter type terminal in plain language. The information may be displayed visually on a screen or punch cards and tapes may be produced for a further computer process or for use in a business machine. It is also possible for microfilm to be produced directly from data recorded on a magnetic tape, disc or drum or from data in electronic form in the central processing unit of a computer. The material recorded in the computer or on the tape, disc or drum is converted into readable characters on a cathode ray tube, and the characters are photographed by a camera. A microfilm is produced which can be read with the aid of a magnifying device. This process is styled C.O.M. or K.O.M. - Computer output on Microfilm.

The reliability of a computer system

6. In systems for recording information which do not involve computers a great deal of reliance is placed on human beings not to make mistakes. A system using a computer must also rely on human beings. As Sieghart says:⁴

“Any information system, however much it is automated, must still rely on people to collect the data, prepare them for the computer, write and test the programs, run the right programs on the right data, and so on. And even the best people will always make some mistakes”.

However, a computer itself does not normally make mistakes.

7. In order to minimise the errors made with respect to information fed into a computer, computers can be programmed to check the consistency of the information fed into the computer.⁵ Information which has been fed into a computer may be protected by recovery

⁴ Sieghart, *Privacy and Computers* (1976 Latimer) at 81.

⁵ For a simple example of how a computer can be programmed to check information which is fed into a computer see Sieghart, *Privacy and Computers* (1976 Latimer) at 79-80.

plans which involve maintaining copies of vital programmes and data in case the system and its file of information is destroyed.

8. Apart from the problems of ensuring that information is accurately recorded by a

APPENDIX V
THE LAW IN ENGLAND

otherwise perceived it being made is admissible for the purpose of showing what statement was made.⁶

4. If the party tendering the statement in evidence has called or intends to call the maker of the statement as a witness in the proceedings the leave of the court is required before the statement can be tendered.⁷ Where such leave is given the statement cannot be given in evidence before the conclusion of the examination-in-chief of the maker of the statement except where before the maker is called the court allows evidence to be given of the making of the statement by a witness other than the maker of the statement, or where the court allows the maker to narrate the statement because preventing him from doing so would adversely affect the intelligibility of his evidence.⁸

5. It appears that statements made in previous legal proceedings are admissible under s.2, though not that part of a transcript dealing with a judge's summing-up.⁹ However, that part of a transcript dealing with a judge's summing-up may be admissible under s.4.¹⁰ If a statement is made by a person in the course of some previous legal proceeding (civil or criminal) the court may authorise the manner in which it may be proved.¹¹

6. A number of safeguards which apply to statements admissible under s.2(1) are discussed in paragraphs 14 to 18 below.

Statements in records

7. A statement contained in a document is admissible as evidence of any fact or opinion stated therein where the document is or forms part of a record.¹² The record must be compiled by a person acting under a duty (whether directly or indirectly through one or more intermediaries) from information supplied by a person (whether acting under a duty or not), who had or may reasonably be supposed to have had personal knowledge of the matters dealt with in the information supplied.¹³ The provision refers to records in general, for example

⁶ *Civil Evidence Act 1968-1977* (Eng), s.2(3).

⁷ *Id.*, s.2(2)(a).

⁸ *Id.*, s.2(2)(b).

⁹ *Taylor v Taylor* [1970] 2 All ER 609 at 614.

¹⁰ *Ibid.* Section 4 is discussed in paragraphs 7 to 9 below.

¹¹ *Civil Evidence Act 1968-1977* (Eng), s.2(3).

¹² *Id.*, s.4(1).

¹³ *Ibid.*

- “(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;
- (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
- (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
- (d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities”.

11. A certificate may be given by a person who occupies a responsible position in relation to the operation of the relevant device or the management of the relevant activities, identifying the document containing the statement, describing the manner in which it was produced, giving details of any device used to produce the document for the purpose of showing that the document was produced by a computer, and relating to any of the conditions referred to in the previous paragraph.²² This certificate is admissible as evidence of any matter stated in it. Provision is made for a penalty for wilfully making a false statement in such a certificate.²³

12. A number of safeguards which apply to statements admissible under s.5(1) are discussed in paragraphs 14, 17 and 18 below.

Supplementary provisions

- (a) Inferences

13. Section 6(2) of the *Civil Evidence Act 1968-1977* (Eng) provides that in deciding whether or not a statement is admissible in evidence under ss.2, 4 or 5 of the Act the court may:

²² Id., s.5(4).

²³ Id., s.6(5).

“.... draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including, in the case of a statement contained

that matter in cross-examination, evidence could not have been adduced by the cross-examining party”.

(e) Rules of court

17. Section 8 of the Act provides for the making of rules of court for the procedure to be followed and the conditions to be fulfilled before a statement admissible under ss.2, 4 or 5 of the Act can be admitted. Rules were made in 1969.²⁴

18. Briefly the rules provide that a party desiring to tender a statement under ss.2, 4 or 5 of the Act is required to give notice of that intention to the other parties to the proceedings.²⁵ The notice must contain details of the statement, persons connected with the statement,²⁶ and any allegation that any such person cannot or should not be called as a witness.²⁷ The reasons which may be advanced for not calling such a person are that the person is:²⁸

“... dead, or beyond the seas or unfit by reason of his bodily or mental condition to attend as a witness or that despite the exercise of reasonable diligence it has not been possible to identify or find him or that he cannot reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise of the statement to which the notice relates”.

²⁴ *Rules of the Supreme Court (Amendment) 1969*

A person on whom a notice has been served may give a counter-notice requiring any person referred to in the notice to be called as a witness.²⁹ If there is a dispute as to whether or not the person can or should be called as a witness that can be determined before the trial.³⁰ The court has a discretion to admit a statement in evidence, notwithstanding that a notice has not been served under rule 21, or that a person has not been called as a witness in response to a counter-notice under rule 26.³¹

CRIMINAL PROCEEDINGS

Present law

19. In criminal proceedings there is provision for the admission of trade or business records in limited circumstances.³² Section 79E of the *Evidence Act 1906-1979* (WA) is similar to s.1 of the *Criminal Evidence Act 1965-1969* (Eng). The major difference between the provisions is that in Western Australia s.79E(2) provides the court with a discretion to reject a statement otherwise admissible. There is no such provision in the *Criminal Evidence Act 1965-1969*

witness, abroad, cannot be identified or found or being available he is either non-compellable or refuses to be sworn.³⁵

(b) Statements in records

22. The Committee recommended that statements in records should be admissible if the information contained in them was supplied by a person who had, or could reasonably be supposed to have had, personal knowledge of the matter in question and if the supplier of the information is called as a witness, or cannot be called for one of the reasons referred to in paragraph 21 above, or if he cannot be expected to remember the matters dealt with in the information supplied.³⁶

(c) Statements produced by computers

23. The Committee recommended that statements produced by computers should be admissible in criminal proceedings³⁷ in circumstances similar to those in which such statements are admissible in civil proceedings.³⁸

(d) Safeguards

24. The major safeguards proposed by the Committee were:³⁹

- “(ii) a statement contained in a proof of evidence (including a proof incorporated in a record) given by a person who is called as a witness in the proceedings in question will not be admissible unless the court gives leave for this on the ground that in the circumstances it is in the interests of justice that the witness’s evidence should be supplemented by the proof;
- (iii) at a trial on indictment a statement will not be admissible by reason of the impossibility of calling the maker unless the party seeking to give it in evidence has given notice of his intention to do so with particulars of the statement and of the reason why he cannot call the maker;
- (iv) a statement said to have been made, after the accused has been charged, by a person who is compellable as a witness but refuses to be sworn or by a person

³⁵ Eleventh Report, *Evidence (General)* (1972) (Cmnd. 4991), paragraph 236, draft Bill, clause 31(1).

³⁶ Id., paragraph 236, draft Bill, clause 34.

³⁷ Id., paragraph 236, draft Bill, clause 35.

³⁸ See paragraphs 10 to 12 above.

³⁹ Eleventh Report, *Evidence (General)* (1972) (Cmnd. 4991), paragraph 237.

said to be abroad, impossible to identify or find, or to have refused to give evidence, will not be admissible at all (and there will be a similar restriction in the case of the supplier of information contained in a record);

- (v) a statement made by the wife or husband of the accused (not being tried jointly with the accused) will not be admissible on behalf of the prosecution unless the maker gives evidence for the prosecution or would have been a compellable witness for the prosecution”.

the proceedings,⁴

credibility of the person who made the statement or supplied the information recorded in the statement is admissible.¹¹

Corroborative evidence

8. Section 56 of the *Evidence Act 1958-1978* (Vic) provides that for the purpose of any rule of law or practice requiring evidence to be corroborated, a statement rendered admissible under ss.55 (documentary out-of-court statements and business records) or 55B (statements produced by computers) of the Act is not to be treated as corroboration of evidence given by the maker of the statement or the person who supplied the information recorded in the statement, as the case may be.

Books of account

9. Prior to the 1971 amendment of the Victorian *Evidence Act 1958-1978*, the Act contained two divisions with regard to the admission of bankers' books (division 9), which was similar to ss.89-96 of the *Evidence Act 1906- 1979* (WA), and books of account (division 10). These have now been amalgamated in ss.58A to 58J of the Victorian *Evidence Act 1958-1978*.

10. In any legal proceeding an entry, or a copy of an entry, in a book of account¹² is prima facie evidence of the matters, transactions and accounts recorded therein.¹³

11. Where a person carrying on a business is a party to any legal proceeding the other party or parties are at liberty to inspect and to make copies of, or to take extracts from, the original entries and the accounts of which such entries form part.¹⁴

¹¹ Id., s.55A.

¹² A "Book of account" is defined in s.58A of the *Evidence Act 1958-1978* (Vic) as including any: "...ledger, day book, cash book, account book, and any other document used in the ordinary business of a bank, or in the ordinary course of any other business for recording the financial transactions of the business and also includes any document used in the ordinary course of any business to record goods produced in, or stock in trade held for, the business".

¹³ *Evidence Act 1958-1978* (Vic), s.58B.

¹⁴ Id., s.58C.

12. Before evidence of any entry is admitted it must be proved that the book of account was at the time of the making of the entry one of the ordinary books of account of the business and that the entry was made in the usual and ordinary course of the business.¹⁵

13. If a person carrying on a business is not a party to legal proceedings, neither that person nor his employees can be compelled to produce the books of account of the business, or to appear as a witness to prove the accounts and transactions recorded, unless an order is made for special cause by a court.¹⁶

¹⁵ Id., s.58D(1).

¹⁶ Id., s.58F to 58H.

APPENDIX VII

THE LAW IN NEW SOUTH WALES

Admissibility of documentary out-of-court statements in civil proceedings

1. In civil proceedings, where direct oral evidence of a fact is admissible, a statement made by a person in a document and tending to establish the fact is admissible if the maker of the statement had personal knowledge of the matters dealt with in the statement and if he is called as a witness.¹

2. Where direct oral evidence of a fact is admissible, a statement made by a person in a document in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters tending to establish that fact (in so far as the matters dealt with in the statement are not within his personal knowledge) is admissible if the maker of the statement is called as a witness and if the document in question is or forms part of a record purporting to be a continuous record.²

3. The condition that the maker of the statement must be called as a witness need not be satisfied in certain circumstances.³ The court has a discretion to admit a statement notwithstanding that the maker of the statement is available but is not called as a witness or the original document is not produced.⁴ The court also has a discretion to admit a statement if, having regard to all the circumstances of the case, it is satisfied that undue delay or expense would otherwise be caused.⁵

4. A statement made by an interested person at a time when proceedings are pending or anticipated involving a dispute as to a fact which the statement might tend to establish is not admissible in the circumstances referred to in paragraphs 1 and 2 above.⁶

¹ *Evidence Act 1898-1979* (NSW), s.14B(1).

² *Ibid.*

³ *Id.*, s.14B(1) Proviso.

⁴ *Id.*, s.14B(2)(a) and (b).

⁵ *Id.*, s.14B(2)

⁶ *Id.*, s.14B(3).

5. There are provisions with regard to the weight to be attached to a statement admissible in the circumstances referred to in paragraphs 1 and 2 above,⁷ and the corroborative value of such statements.⁸

6. Where the proceedings are with a jury the court has a discretion to reject a statement otherwise admissible if:⁹

“... it appears to the court that the weight of the statement is too slight to justify its admission, or that the utility of the statement is outweighed by a probability that its admission will be unfair or mislead the jury”.

7. Where the trial is with a jury the court also has a discretion to withhold a statement from the jury if it appears to the court that the jury might give the statement undue weight if it had the statement with it during its deliberation.¹⁰

Admissibility of business records

Introduction

8. In 1973 the New South Wales Law Reform Commission submitted a report¹¹ and a draft bill on the admissibility of business records. The draft bill as enacted with only minor alterations by the *Evidence (Amendment) Act 1976*.¹²

Consideration of Victorian legislation

9. The New South Wales Law Reform Commission considered recommending the implementation of s.55B (relating to statements produced by computers) of the Victorian *Evidence Act 1958-1978*.¹³ However, the Commission concluded that such an approach would have the effect of:¹⁴

⁷ Id., s.14C(1).

⁸ Id., s.14C(2).

⁹ Id., s.14B(6).

¹⁰ Id., s.14B(7).

¹¹ Law Reform Commission of New South Wales, *Evidence (Business Records)* (LRC 17).

¹² The Law Reform Commission of New South Wales has since made a report on the rule against hearsay evidence: Law Reform Commission of New South Wales, *The Rule Against Hearsay* (1978).

¹³ See Appendix VI, paragraphs 5 and 6.

¹⁴ *Evidence (Business Records)* (LRC 17), paragraph 4.

“...making a document admissible if it was produced by a computer, but inadmissible if it was produced by other reliable means”.

It was the Commission's view that such a result was unjustified and it recommended that the New South Wales *Evidence Act 1898* be amended to provide a: ¹⁵

“... [statutory] exception which will facilitate the admission in legal proceedings of reliable statements in business records, however kept or produced, as evidence of the matters recorded”.

Conditions of admissibility

10. The *Evidence (Amendment) Act 1976* provided for a new Part IIC (ss.14CD to 14CV)¹⁶ relating to the admissibility of business records. Section 14CE provides that where in legal proceedings evidence of a fact is admissible, a statement in a document¹⁷ of the fact, is admissible as evidence of the fact,¹⁸ if the document is or forms part of a record of a business and if the statement was made in the course of or for the purpose of the business.¹⁹ The statement must have been made by a “qualified person”,²⁰ or reproduce or be derived²¹ from

¹⁵ Id., paragraph 5.

¹⁶ The numbering of the sections in the Act differs from the numbering of the clauses in the draft Bill prepared by the New South Wales Law Reform Commission.

¹⁷ See *Evidence Act 1898-1978* (NSW), s.14CD(1), where “document” is defined as including any record of information. It was intended to extend to all things used to record information which have been or may be devised, including a computer

¹⁸ Section 14CE(2) provides that in so far as s.14CE(1) is concerned “fact” includes opinion.

¹⁹ “Business” is defined as including:

“(a) any business (including business as a banker), profession, occupation, calling, trade or undertaking whether engaged in or carried on -

(i) by the Crown in right of the State or any other right, or a person;

(ii) for profit or not; or

(iii) in New South Wales or elsewhere; and

(b) public administration of the Commonwealth, including a Territory of the Commonwealth, a State or any country, carried on in New South Wales or elsewhere”: *Evidence Act 1898-1979* (NSW), s.14CD(1).

²⁰ “Qualified person” means a person who, at the time the statement was made was an owner, or a servant or agent of the business, or a person retained for the purposes of the business or a person associated with the business in the course of another business; and where the statement is not admissible in evidence unless made by an expert, that the person was an expert, or in any other case the person had or may reasonably be supposed to have had personal knowledge of the facts stated: *Evidence Act 1898-1979* (NSW), s.14CD(1).

A statement is said to be made by a person if it is written, made, dictated or otherwise produced by him or it is recognized by him as his statement by signing, initialling or otherwise: s.14CD(2). This section was intended “. . . to resolve doubts and prevent debate about who is to be considered the maker of a statement in situations such as where a person dictates a statement to a typist who transcribes it from shorthand notes and the person who dictates it does not sign or initial it”: *Evidence (Business Records)* (LRC 17) at 40.

²¹ “Derived” means derived by the use of a computer or otherwise, by calculation, comparison, selection, sorting, consolidation or by accounting, statistical or logical procedures: s.14CD(1). The New South Wales Commission intended that the definition would limit the application of “derived” to “. . .

information in one or more than one statement each made by a qualified person in the course of or for the purpose of the business, or from information, not supplied by any person, but supplied by a device designed for recording, measuring, counting or identifying information. In civil proceedings it is not a condition of admissibility that any person concerned in the making of the statement is called as a witness.

11. A statement is admissible under s.14CE notwithstanding the rule against hearsay, the rule against secondary evidence,²² that any person concerned in the making of the statement is not called as a witness, or that the statement was in such a form that it would not be admissible if given as oral testimony.²³

12. Section 14CH of the Act provides that where in the course of a business a system has been followed to make and keep a record of all events of a particular kind the absence of a record of an event of that kind is evidence that it did not happen. Section 14CJ provides for the matters to be taken into account in estimating the weight of evidence admitted under s. 14CH.

Safeguards

(a) Criminal proceedings

13. In criminal proceedings, where a statement is tendered in evidence under s.14CE and the statement is made by a person or is derived from or reproduces information in a statement made by a person, the statement is not admissible unless each person concerned in making the statement is called by the tendering party as a witness if so required by any opposing party, or unless it appears to the court:²⁴

- “(i) that he is dead or is unfit by reason of his bodily or mental condition to attend as a witness;

procedures of an objective nature and to those commonly accepted as accurate although involving some subjective judgment”: *Evidence (Business Records)* (LRC 17) at 39.

²² These rules provide that the contents of a document must be proved by the production of the original. There are, however, exceptions, for example where the original has been lost: See *Cross on Evidence* (2nd Aust. ed. 1979) at 612-620.

²³ *Evidence Act 1898-1979* (NSW), s.14CE(3).

²⁴ *Id.*, s.14CG(1) and (2).

- (ii) that he is outside New South Wales and it is not reasonably practicable to secure his attendance;
- (iii) that all reasonable steps have been taken to identify him and he cannot be identified;
- (iv) that his identity being known, all reasonable steps have been taken to find him and he cannot be found;
- (v) that, having regard to the time which has elapsed since he supplied the information and to all the circumstances, he cannot reasonably be expected to have any recollection of the matters dealt with in the statement; or
- (vi) that, having regard to all the circumstances of the case, undue delay or expense would be caused by calling him as a witness.”

A statement made in connection with criminal proceedings or with investigations is not admissible under s.14CE,²⁵ and Part IIC does not operate to affect the power of the court to reject evidence which if admitted would operate unfairly against the defendant.²⁶

(b) General

14. There are a number of general safeguard provisions which apply to any statement admissible under s.14CE. Section 14CI makes provision for the matters to be taken into account in estimating the weight to be attached to such a statement and s. 14CK provides for the admissibility of evidence as to the credibility of a person who made such a statement where that person is not called as a witness. A statement made or obtained for the purpose of, or in contemplation of, a legal proceeding or other legal proceeding arising out of the same or substantially the same facts is not admissible under s.14CE.²⁷ The court also has a general discretion to reject evidence tendered under Part IIC if its weight is slight, or if its admission

²⁵ Id., s.14CG(3).

²⁶ Id., s.14CS.

²⁷ Id., s.14CF(1).

will unduly prolong the hearing or it is unfair or misleading.²⁸ A further safeguard is provided in the case of trial with a jury. Section 14CQ of the Act provides that in a jury trial where it appears to the court that if a jury were to have the document during its deliberations it might give undue weight to the statement the court may direct that the document be withheld from the jury during its deliberations.

15. Section 14CU of the Act provides for the making of rules of court or regulations

APPENDIX VIII

THE LAW IN SOUTH AUSTRALIA

Documentary out-of-court statements

I. In South Australia there is provision¹ for the admission of documentary out-of-court statements in civil proceedings similar to s.14B(1) to (5) of the *Evidence Act 1898-1979* (NSW).² In addition s.45b(1) of the *Evidence Act 1929-1979* (SA) provides that an apparently genuine document purporting to contain a statement of fact, or a written, graphical, or pictorial matter in which a statement of fact is implicit or from which a statement of fact may be inferred is admissible in evidence. It has been held that an opinion included in a document is not admissible under the section.³ A document is only admissible if the court is satisfied that the person by whom, or at whose direction, it was prepared could, at the time of the preparation of the document, have deposed of his own knowledge as to the statement that is contained, or implicit in, or may be inferred from, the contents of the document.⁴

2. Moreover, the document is not admissible if the court is of the opinion that the person by, or at whose direction, the document was prepared can or should be called as a witness; or that the evidentiary weight of the document is slight and is outweighed by the prejudice that might result to any of the parties; or that it would be otherwise contrary to the interests of justice to admit it.⁵

Business records

3. Section 45a(1) of the *Evidence Act 1929-1979* (SA) provides that an apparently genuine document purporting to be a business record is admissible as evidence without further proof of any fact stated therein or of any fact that may be inferred from the record. A “business record” is defined as:⁶

“... any book of account or other document prepared or used in the ordinary course of a business for the purpose of recording any matter relating to the business .. .”

¹ *Evidence Act 1929-1979* (SA), ss.34c and 34d.

² See Appendix VII, paragraphs 1 to 5.

³ See *Bates v Nelson* (1973) 6 SASR 149.

⁴ *Evidence Act 1929-1979* (SA), s.45b(2).

⁵ Id., s.45b(3).

⁶ Id., s.45a(4).

or any reproduction of the document.⁷

4. However, the document is not admissible if the court is of the opinion that the person by, or at whose direction, the document was prepared can or should be called as a witness; or that the evidentiary weight of the document is slight and is outweighed by the prejudice that might result to any of the parties; or that it would be otherwise contrary to the interest of justice to admit it.⁸

5. There is also a specific provision with respect to the admissibility of documents relating to the transportation of persons or goods.⁹ An apparently genuine “document of a prescribed nature”,¹⁰ relating to the transportation or shipment of any person or goods from one place to another is admissible in evidence, on production, without further proof.¹¹ Such a document is evidence of any fact stated or referred to in, or inferred from, the document, and that the owner of goods referred to in any such document is the consignee named in the document, or his assignee.¹²

6. This section enables the admission of evidence such as that which was admitted in *R. v Rice*.¹³ In *R. v Rice* a used ticket, which bore the name of a person, was admitted as evidence that a person of that name travelled on the flight mentioned on the ticket.

Computer records

7. In 1969, the Law Reform Committee of South Australia in its Tenth Report¹⁴ recommended the implementation of legislation based on s.5 of the *Civil Evidence Act 1968-1977* (Eng),¹⁵ providing for the admissibility of documentary statements produced by computers. The recommendation was implemented by s.14 of the *Evidence Amendment Act*

⁷ Ibid.

⁸ *Evidence Act 1929-1979* (SA), s.45a(2).

⁹ *Id.*, s.45.

¹⁰ *Id.*, s.45(4). “Document of a prescribed nature” means a “... bill of lading, manifest, shipping receipt, consignment note, waybill, delivery sheet, register or order, invoice, ticket, passenger list or register, and any document of a like nature”.

¹¹ *Evidence Act 1929-1979* (SA), s.45(1)(a).

¹² *Id.*, s.45(1)(b).

¹³ [1963] 1 All ER 832.

¹⁴ *Evidence Act - New Part VIA Computer Evidence* (1969).

¹⁵ See Appendix V, paragraphs 10 to 12.

- (vii) that there is no reasonable cause to believe that the accuracy or validity of the output has been adversely affected by the use of any improper process or procedure or by inadequate safeguards in the use of the computer.

10. An apparently genuine document purporting to be a record kept in accordance with these conditions must be accepted as such in the absence of contrary evidence.¹⁷

11. A certificate may be given by a person having prescribed qualifications or a person responsible for the management or operation of the computer system as to any or all of the conditions referred to above.¹⁸

12. In the absence of evidence to the contrary the certificate is proof of the matters certified.¹⁹ The court has a discretion to require that oral evidence be given of any matters contained in the certificate and to require the person who gave the certificate to attend for examination or cross-examination upon the matters contained in the certificate.²⁰

Bankers' books

13. Sections 46 to 52 of the *Evidence Act 1929-1979* (SA) relate to bankers' books and are similar to ss .89 to 96 of the *Evidence Act 1906-1979* (WA).

¹⁷ Id., s.59b(5).

¹⁸ Id., s.59b(4).

¹⁹ Ibid.

²⁰ *Evidence Act 1929-1979* (SA), s.59b(6).

APPENDIX IX

THE LAW IN QUEENSLAND

Introduction

1. In November 1975, the Law Reform Commission of Queensland submitted a report, including a draft bill, with regard to the consolidation and reform of the law of evidence in Queensland.¹ The recommendations of the Commission were substantially enacted by the *Evidence Act 1977*.

Civil proceedings

Documentary statements

2. Under s.92(1)(a) of the *Evidence Act 1977-1979* documentary statements of which the maker had personal knowledge are admissible if the maker is called as a witness. In certain circumstances, the maker of the statement need not be called.²

Records

3. Where a document is or forms part of a record relating to any undertaking³ and is made in the course of that undertaking from information supplied by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information supplied the document is admissible if the supplier of information is called as a witness.⁴ In certain circumstances, the supplier of information need not be called as a witness.⁵

¹ Law Reform Commission of Queensland, *Evidence* (QLRC 19).

² *Evidence Act 1977-1979* (Qld), s.92(2).

³ “Undertaking” includes:

“... public administration and any business, profession, occupation, calling, trade or undertaking whether engaged in or carried on -

(a) by the Crown (in right of the State of Queensland or any other right), or by a statutory body, or by any other person;

(b)

Statements produced by computers

4. Under s.95 of the *Evidence Act 1977-1979* statements produced by computers are admissible in circumstances similar to those in which statements in records produced by computers are admissible in England.⁶

Criminal proceedings

5. In criminal proceedings a document which is or forms part of a record relating to any trade or business is admissible in circumstances similar to those in which such records are admissible in Western Australia in criminal proceedings.⁷

6. Section 95 of the *Evidence Act 1977-1979*, referred to in paragraph 4 above, relating to the admissibility of statements in records produced by computers also applies to criminal proceedings.

Books of account

7. Under ss. 83-91 books of account are admissible in circumstances similar to those in which books of account are admissible in Victoria.⁸

⁶ See Appendix V, paragraphs 10 to 12.

⁷ *Evidence Act 1977-1979* (Qld), s.93.

⁸ See Appendix VI, paragraphs 9 to 13.

supplied by him, the statement is admissible if direct oral evidence of the fact would be admissible and once the following conditions are satisfied -⁵

- (i) that the document was made by a person acting under a duty to make the statement;
- (ii) that the document was made in the course of, and as a record, or part of a record relating to any business; or in the course of, or as a record or part of a record relating to, the administration of, or in the performance of the functions of a government department from information supplied by a person who had, or might reasonably be supposed to have had personal knowledge of the matters dealt with in the information supplied; and if
- (iii) the supplier of information is dead or outside Australia and it is not reasonably practicable to secure his attendance as a witness; or unfit by reason of old age or his bodily or mental condition to appear as a witness; or cannot with reasonable diligence be identified or found; or cannot reasonably be expected, having regard to the time that has elapsed since he supplied the information and to all other relevant circumstances, to recollect the matters dealt with in the information supplied by him.

3. A statement in a document, made at a time when a criminal proceeding was pending, or at a time when it might reasonably have been contemplated that the proceedings would be instituted, is

- (i) that the document was produced by the computer during a period when the computer was used to store or process information;
- (ii) that the information contained in the statement or of the kind from which the information contained in the statement is derived was in that period regularly supplied to the computer in the ordinary course of the carrying on of those activities;
- (iii) that the computer was, throughout the material part of that period operating properly or, if not, that in any respect in which it was not so operating properly or was out of operation that it was not such as to affect the production of the document of the accuracy of its contents; and
- (iv) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of carrying on of those activities.

5. The court has a discretion to refuse to admit the document in evidence if it has reason to doubt the accuracy or authenticity of the document sought to be admitted.⁹

Bankers' books

6. The provisions with regard to bankers' books¹⁰ are similar to ss.89 to 96 of the *Evidence Act 1906-1979* (WA).

The Evidence (Australian Capital Territory) Bill 1972

7. In 1972, following the disallowance of the *Evidence Ordinance 1971*¹¹ the Evidence (Australian Capital Territory) Bill 1972 was introduced. This Bill was referred to the Senate Standing Committee on Constitutional and Legal Affairs. That Committee reported to the Senate on the Bill in November 1977.¹²

⁹ Id., s.43.(1)

¹⁰ Id., ss.21-27.

¹¹ See footnote 1 above.

¹² Senate Standing Committee on Constitutional and Legal Affairs, *The Evidence (Australian Capital Territory) Bill 1972* (November 1977), Parliamentary Paper No. 237/1977.

8. The provisions of the Bill relating to the admissibility of documentary out-of-court statements, records and statements produced by computers are almost identical to the corresponding provisions of the *Evidence Ordinance 1971* discussed in paragraphs 1 to 5 above. One significant difference is that clause 42 of the Bill provides for the admissibility of computer records in both civil and criminal proceedings; under the Ordinance such records are only admissible in civil proceedings.

9. The Committee recommended that the provisions with respect to the admissibility of computer records should be assimilated to those applicable to documentary out-of-court statements and records.¹³ The Committee said that:¹⁴

“... there should not be a different standard of admissibility for documents produced by computer to documents produced by equally reliable means in the course of conventionally kept records.”

10. The provisions of the Bill relating to bankers' books are almost identical to those in the *Evidence Ordinance 1971* referred to in paragraph 6 above. The Committee recommended that the provisions relating to bankers' books “. . . be widened to include equivalent accounting records kept by business and by government”.¹⁵

11. The Committee also recommended that a review of the law of evidence be undertaken by the Australian Law Reform Commission.¹⁶ The Commonwealth Attorney General accepted this recommendation and in July 1979 the Commission was asked to review the law of evidence applicable in proceedings in Federal and Territory courts. In a Ministerial Statement in November 1979¹⁷ the Attorney General said that having referred the matter to the Australian Law Reform Commission it would be inappropriate to introduce a Bill on the law of evidence.

¹³ Id., paragraphs 62 to 65.

¹⁴ Id., paragraphs 62

¹⁵ Id., paragraph 42.

¹⁶ Id., paragraph 26.

¹⁷ *Commonwealth Parliamentary Debates*, Senate, Vol. S.23 1979, at 2551-2553.

APPENDIX XI

THE LAW IN TASMANIA

Documentary out-of court statements

1. In 1974 following the recommendations of the Tasmanian Law Reform Committee¹ amendments were made to the *Evidence Act 1910* with regard to the admissibility of hearsay evidence. A new division, Division VII (ss.81A to 81Q), was enacted providing a number of statutory exceptions to the hearsay rule.

2. Section 81B of the *Evidence Act 1910-1977* provides for the admissibility of documentary evidence of facts in issue where the maker of a representation in a document is called as a witness.² Section 81C makes provision for the admissibility of documentary evidence of facts in issue where the maker of the representation in the document is unavailable, and section 81D makes provision for the admissibility of documentary evidence of opinions where the person expressing an opinion in the document is unavailable.

3. In proceedings (other than committal proceedings) where a party intends to tender in evidence a representation under ss.81C and 81D without calling the maker of the representation, he is required to give to the other party or parties to the proceeding a notice of that intention.³ The notice must be accompanied by a copy of the representation.⁴

4. In committal proceedings, a complainant may submit in evidence a representation which is prima facie admissible under ss. 81B, 81C and 81D.⁵ The justices presiding at the committal hearing are not permitted to rule on its admissibility, though they may prohibit its publication.⁶

5. The trial judge has a discretion to exclude any evidence tendered under ss.81B, 81C or 81D if the judge is satisfied that the probative value of the evidence is outweighed by the consideration that its admission or that the determination of its admissibility may necessitate

¹ The Tasmanian Law Reform Committee, *Law of Evidence - The Hearsay Rule*.

² This provision is based on s.28 of the *Evidence Ordinance 1971 (ACT)*: see Appendix X, paragraph 1.

³ *Evidence Act 1910-1977 (Tas)*, s.81G(1)(a).

⁴ *Id.*, s.81G(1)(b).

⁵ *Id.*, s.81G(3).

⁶ *Id.*, s.81G(4).

undue consumption of time, or that it may create undue prejudice, or confuses the issues, or, in the case of a proceeding with a jury, mislead the jury.⁷ The common law discretion to exclude evidence at a criminal trial is preserved.⁸

6. In civil proceedings, where it is not proved that the maker of the representation is unavailable in accordance with ss.81C or 81D and he is not called as a witness, the judge has a discretion to order that the representation be admitted in evidence when undue delay or expense would otherwise be caused or, it would not for any reason be inexpedient in the interests of justice to admit the representation.⁹

7. In criminal trials, a representation admitted under ss. 81B, 81C or 81D is to be read to the jury. However, it is not to be made available to them as an exhibit unless the judge is of the opinion that the contents of the representation are so complex that the representation could not reasonably be comprehended by members of the jury without reading it for themselves.¹⁰

8. Section 81J provides for the circumstances in which may be given impeaching the credit of the person who made the representation admitted in evidence by virtue of ss . 81C or 81D.

Business records

9. Provision is made in s.40A of the *Evidence Act 1910-*

the admission of documents relating to the transportation of persons or goods.¹² The Tasmanian Evidence Act has no specific provision relating to the admissibility of statements produced by computers.

11. In 1978 the Law Reform Commission of Tasmania recommended that provisions along the lines of ss.14CD-14CU of the

APPENDIX XII
THE LAW OF THE COMMONWEALTH OF AUSTRALIA

In any proceeding before the High Court or any court, other than a court of a Territory, created by the Commonwealth Parliament business records are admissible under ss. 7A-7S of the *Evidence Act 1905-1979* in circumstances similar to those applicable to business records in New South Wales.¹ The Act does not contain any exceptions to the hearsay rule similar to ss.79B to 79E of the *Evidence Act 1906-1979* (WA).

¹ See Appendix VII, paragraph 8 to 15.

APPENDIX XIII

THE LAW IN NEW ZEALAND

1. There is provision in New Zealand for the admissibility of documentary out-of-court statements in both civil and criminal proceedings.¹ In civil proceedings documentary out-of-court statements are admissible in circumstances similar to those provided in s.14B(1) to (5) of the *Evidence Act 1898-1979* (NSW).² In criminal proceedings there is provision for the admissibility of business records in circumstances similar to s.79E of the *Evidence Act 1906-1979* (WA).³ There is no specific provision for the admissibility of computer records.

¹ The Torts and General Law Reform Committee of New Zealand has recommended that the circumstance in which documentary out-of-court statements should be admissible be extended: *Hearsay Evidence* (July 1967). A Bill based on this report and reports of the Committee in 1972 and 1977 was introduced in October 1979 and referred to the Statute Revision Committee for study.

² *Evidence Amendment Act 1945* (NZ), ss.2-4. See Appendix VII, paragraphs 1 to 5 for a discussion of the New South Wales provision.

³ *Evidence Amendment Act 1908-1977* 1d0 TXs3I TD /Tn2* () Tj B3-20.25 H-7.75 To Tc 0.324sert toby Tcf the

APPENDIX XIV

3. The Commission therefore recommended that statements made in the course of regularly conducted activities should be admissible.³

“... if the record was made in the course of a regularly conducted activity at or near the time the fact occurred or existed or the opinion was formed, or at a subsequent time if compiled from a record so made at or near such time”.

Absence of a record or entry

4. The Commission was of the view that there may be situations in which a record of a regularly conducted activity is silent on a matter of which a record would normally have been kept. The Commission said:⁴

“The absence of the record is clearly relevant as tending to prove that the matter did not take place.”

The Commission therefore recommended that evidence should be admissible to show:⁵

“... that a matter is not included in a record made in the course of a regularly conducted activity, to prove the non-occurrence or non-existence of the matter if it was of a kind of which such a record was regularly made or preserved”.

³ Id., at 27, clause 31(a).

⁴ Id., at 74.

⁵ Id., at 27-28, clause 31(d).