SCOTTISH LAW COMMISSION
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Evidence: Report on Documentary Evidence and Proof of Undisputed Facts in Criminal Proceedings

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

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SCOTTISH LAW COMMISSION

Item 1 of our First Programme of Law Reform

Evidence: Report on Documentary Evidence and Proof of Undisputed Facts in Criminal Proceedings

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

We have the honour to submit our Report on Documentary Evidence and Proof of Undisputed Facts in Criminal Proceedings.

(*Signed*) **C K DAVIDSON,** *Chairman*
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KENNETH F BARCLAY, *Secretary*
27 August 1992

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Part I Introduction

The background to this Report

1.1 This Report is one of a series of reports on topics in the law of evidence, a subject included in our First Programme of Law Reform.[1] In 1980 we published a Consultative Memorandum[2] which reviewed many areas of the law of evidence and invited comments on a wide range of proposals for reform. Thereafter, however, we decided not to produce one large report on the law of evidence but instead to prepare a series of reports on particular areas of the law which appeared to merit examination with a view to possible reform. We have accordingly published reports on *Evidence in Cases of Rape and Other Sexual Offences*,[3] on *Corroboration, Hearsay and Related Matters in Civil Proceedings*,[4] on *Blood Group Tests, DNA Tests and Related Matters*[5] and on *The Evidence of Children and Other Potentially Vulnerable Witnesses*.[6] We have also published a discussion paper on *Confidentiality in Family Mediation*[7] and we have submitted a report to you on that subject entitled *Protection of Family Mediation*[8] which will be published in the autumn of 1992.

Our Discussion Paper and this Report

1.2 In 1988 we published a discussion paper on *Affidavit Evidence, Hearsay and Related Matters in Criminal Proceedings.*[9] The issues addressed in the Discussion Paper were: the admission of evidence by affidavit; the rule against hearsay; the admissibility of the prior statements of witnesses and accused persons; computer and other machine-generated evidence; and miscellaneous matters relative to documentary evidence. We are grateful to all those who responded to the Discussion Paper. Their names are listed in Appendix B.

1.3 We are undertaking a comprehensive re-examination of all the issues considered in the Discussion Paper in the light of the comments submitted by those who responded to it and further research. In the ordinary course of events we would deal with all these matters in a single Report. We have decided, however, to give priority to our consideration of certain of them and to make them the subject of this Report. We have done so in view of the recent comments by the Lord Justice-General, Lord Hope, on the urgent need for statutory provisions for Scotland similar to those which in England and Wales apply to statements in

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[1] (1965) Scot Law Com No 1.
[2] Consultative Memorandum No 46, *Law of Evidence*.
[3] (1983) Scot Law Com No 78, implemented by s 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.
[4] (1986) Scot Law Com No 100, implemented with modifications by the Civil Evidence (Scotland) Act 1988.
[5] (1989) Scot Law Com No 120, implemented in part by s 70 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and intended to be further implemented by cl 28 of the Prisoners and Criminal Proceedings (Scotland) Bill. References to the Bill are to the print dated 2 July 1992.
[6] (1990) Scot Law Com No 125, implemented in part by ss 56, 59 and 60 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and intended to be further implemented by cls 33-35 of the Prisoners and Criminal Proceedings (Scotland) Bill.
[7] (1991) Scot Law Com DP No 92.
[8] (1992) Scot Law Com No 136.
[9] DP No 77(hereafter "the Discussion Paper").

documents in criminal proceedings.[10] An opportunity for legislation on that subject has been presented by the Prisoners and Criminal Proceedings (Scotland) Bill which is now before Parliament, and we have already made recommendations which have been broadly followed, although with a few significant modifications, in Schedule 3 to the Bill,[11] which makes provision as to the admissibility in criminal proceedings of copy documents and of evidence contained in business documents. These recommendations are substantially repeated in Parts II and III of this Report, where they are fully explained and the corresponding provisions of Schedule 3, or divergencies from these provisions, are noted.[12] Our draft Bill in Appendix A is followed by a comparative table in which the corresponding provisions of Schedule 3 and our draft Bill are tabulated and references are given to the relevant paragraphs of this Report.

1.4 We have also given priority to our recommendations on the subject of proof of undisputed facts. These are derived from our consideration of certain of the responses to the proposal in the Discussion Paper that affidavits might be admitted instead of oral evidence. As we explain in Part IV, we have been convinced that that proposal should not be pursued and we recommend instead a procedure whereby facts which will not be disputed at the trial may be formally admitted beforehand. We have included these recommendations in this Report for two reasons: because they attempt to meet current concern about the inconvenience suffered by witnesses who are required to attend court to prove matters which are not in dispute; and because they are also closely related to the subject-matter of Parts II and III in that statements in documents of the kind there considered are very seldom challenged in practice and thus could often be among the matters agreed before the trial by means of the procedure recommended in Part IV. That procedure is essentially a development of the "routine evidence" provisions in section 26 of and Schedule 1 to the Criminal Justice (Scotland) Act 1980 which are amended by clause 36 of and Schedule 4 to the Prisoners and Criminal Proceedings (Scotland) Bill.

Structure of this Report

1.5 In Part II of this Report we recommend some modification of the rule against hearsay as it applies to statements in business documents, including business documents generated by computer. In Part III we make recommendations as to how such statements may be proved. The effect of all these recommendations would be to extend very appreciably the range of statements in business documents which would be admissible in criminal proceedings as evidence of the facts stated in them, and to facilitate the proof of such statements, without prejudice to the fairness of the trial. In Part III we also recommend that authenticated copies of documents (not only business documents) should be generally deemed to be true copies and treated for evidential purposes as the originals; and we recommend the repeal of provision in the Bankers' Books Evidence Act 1879 as to entries in bankers' books. In Part IV we explain our recommended procedure whereby facts which are not in dispute between the prosecution and the defence may be established at the trial

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[10] *Lord Advocate's Reference (No 1 of 1992)* 1992 SCCR 724 at p 743.

[11] Inserted by amendment in the House of Lords on 2 July 1992: see Hansard, HL Deb vol 538, cols 877-880.

[12] The principal differences are that Sched 3 admits a statement in a document received by a business (para 2(1)(a): see paras 2.31, 2.32 below), applies to statements by the accused (see para 2.33 below) and does not repeal ss 3-6 of the Bankers' Books Evidence Act 1879 (para 6(1)(b): see paras 3.22-3.25 below). There are minor differences as to the authentication of documents (paras 1(1), 3: see paras 3.16, 3.5, 3.6 below), the definition of "statement" (para 7: see para 2.17 below) and whether an intermediate supplier of information need only have received it in the course of a business (para 2(2): see para 2.27 below).

without proof by means of evidence. All our recommendations for reform are summarised in Part V. A draft Bill to give effect to our recommendations, together with explanatory notes and a comparative table, appears in Appendix A.

Part II Statements in business documents

Introduction

2.1 In this Part we recommend some modification of the rule against hearsay as it applies to statements in a category of documents which we shall call, for the sake of brevity, "business documents".[1] In the following paragraphs we shall review the present law[2] and refer to our proposals in the Discussion Paper and the responses of consultees.[3] We shall then discuss the principles on which we consider reform of this branch of the law of evidence should be based,[4] and finally we shall explain our recommendations.[5] In the Discussion Paper we considered computer-generated evidence separately from business documents but, as we shall explain, the statutory provisions which we recommend would regulate the admissibility of hearsay statements in business documents generally, including those generated by computer.[6] The effect of our recommendations would be to expand very appreciably the range of statements in business documents which would be admissible as evidence of the matters stated in them.

The present law

2.2 The rule against hearsay has been formulated as follows:[7]

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

The rule applies to statements in documents as well as to statements made orally: they are inadmissible as evidence of the truth of the matters stated, unless an exception to the rule applies. Some statements in documents fall within common law exceptions to the rule, such as written confessions by accused persons and, in certain circumstances, written statements by deceased persons. There are also common law and statutory exceptions in favour of statements in records kept by public officials[8] and in various other public documents,[9] but the great majority of the documentary statements which might be sources of relevant information at criminal trials are contained in private documents, including documents kept by businesses and undertakings. Such documents are not normally evidence in themselves: they can only support the oral evidence of witnesses who are able to identify them in court and speak from their own knowledge of the truth or otherwise of the statements which the documents contain.

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[1] For a full discussion of the scope of this class of documents see paras 2.21-2.30 below.
[2] See paras 2.2-2.5 below.
[3] See paras 2.6, 2.7 below.
[4] See paras 2.8, 2.9 below.
[5] See paras 2.10 ff below.
[6] See paras 2.50-2.57 below.
[7] Cross on *Evidence* (7th ed, 1990, by the late Sir Rupert Cross and C Tapper, hereafter "Cross"), p 509. A shorter formulation (omitting "or opinion") on p 38 of the 6th ed (p 42 of the 7th ed) was approved by the House of Lords in *R v Sharp* [1988] 1 WLR 7 at p 11, [1988] 1 All ER 65 at p 68 and by the High Court of Justiciary in *Morrison v HMA* 1990 JC 299 at p 312, 1990 SCCR 235 at p 247, 1991 SLT 57 at p 62.
[8] W G Dickson, *The Law of Evidence in Scotland* (3rd ed, 1887 ed P J Hamilton Grierson), paras 1104, 1205 ff.
[9] *The Laws of Scotland: Stair Memorial Encyclopaedia* (hereafter "*Encyclopaedia*") vol 10 (1990), paras 574-598.

2.3 In this respect the law of evidence is not well suited to the needs of a society which increasingly depends on information kept or generated by a growing variety of technical methods. The High Court of Justiciary decided recently that where it is impossible to identify the authors of entries in computer records, the content of the entries may be spoken to by a responsible person in charge of the operation of the computer. The Court recognised, however, that that ruling might not be of substantial assistance, and regretted the absence of legislation for Scotland which would reduce the inconvenience of the hearsay rule in regard to evidence from documentary records in criminal cases.[10] The law cannot supply a convenient way of proving in criminal trials facts which may be discovered by resorting to sources of information which are nowadays generally regarded as reliable. The need for new rules is particularly acute in trials where it is necessary to prove matters concerned with the activities of a trade or business. The law was modified to a limited extent by the Criminal Evidence Act 1965[11] which was passed shortly after the House of Lords in an English appeal, *Myers v DPP*,[12] had observed that any new exceptions to the hearsay rule must be created by legislation.[13] The Act extended to Scotland, England and Wales, but was repealed for England and Wales in 1984.[14] In England and Wales equivalent provisions now appear in Part II of the Criminal Justice Act 1988.[15] The leading provision of the 1965 Act is section 1(1), which provides:

> "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 circumstances) to have any recollection of the matters dealt with in the information he supplied."

2.4 The Act has proved to have several weaknesses, which are identified and discussed in detail in the Discussion Paper.[16] It is limited in scope: it applies only to statements in a documentary "record" of a "trade or business", and then only when direct oral evidence is not available for specified reasons - that the person who supplied the information is dead, abroad, unfit to attend, cannot be found or cannot reasonably be expected to have any

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[10] *Lord Advocate's Reference (No 1 of 1992)* 1992 SCCR 724 at p 743.
[11] 1965, c 20. The Act is essentially an adaptation to criminal proceedings of certain provisions of the (English) Evidence Act 1938 (1 & 2 Geo VI, c 28).
[12] [1965] AC 1001. Microfilm records of numbers stamped on the cylinder blocks of cars at the time of manufacture were held to be inadmissible as evidence of the identity of stolen cars.
[13] See also *R v Kearley* [1992] 2 WLR 656. In Scotland it is within the inherent power of the High Court of Justiciary to modify the hearsay rule by developing the application of well-established principles: *Lord Advocate's Reference (No 1 of 1992), supra*.
[14] Police and Criminal Evidence Act 1984, c 60 (hereafter "PACE"), s 119(2), Sched 7, Pt III.
[15] 1988, c 33. See para 2.5 below.
[16] DP, paras 3.50-3.55.

recollection of the matters dealt with. Consequently, various categories of statements in documents compiled in circumstances which indicate that they are likely to be reliable are still inadmissible, either because the documents are not "records" or because they were not compiled in the course of a "trade or business". "Record" has been so interpreted by the English courts as to exclude many classes of document which are accepted outside the courtroom as reliable sources of information to which little, if anything, might be added by the oral testimony of the person who supplied the information.[17] "Business" has been held to exclude a Government department,[18] a National Health Service hospital[19] and the Argyll and Clyde Health Board.[20] If the supplier of the information is alive, well, within the United Kingdom and might be expected to have some recollection of the matters dealt with, the record is inadmissible as evidence of the fact stated and the supplier must give evidence even though there might be little or nothing that he could add to what is stated in the record.

2.5 Other statutes dealing with the admissibility of documentary hearsay have restricted admissibility to statements in documents compiled "in the performance of a duty"[21] or "by a person acting under a duty".[22] There are, however, many business documents which could not be said to have been so compiled. The Criminal Justice Act 1988, on the other hand, makes admissible, subject to conditions, a statement in a document "created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office."[23] Where the information in the document was supplied through a chain of intermediaries, each person through whom it was supplied must have received it in the course of a trade, etc, as above.[24] Further, the supplier of the information must have had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.[25] Additional conditions applicable to the supplier of the information, such as his unavailability through death or illness, are attached only where the statement has been prepared for the purposes of pending or contemplated criminal proceedings or of a criminal investigation.[26]

Our Discussion Paper and the responses

2.6 In the Discussion Paper we proposed that the Criminal Evidence Act 1965 should be repealed and replaced by a significantly modified version of the above provisions of the Criminal Justice Act 1988. We proposed that a statement in a document should be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible if (1) the document was created or received by a person in the course of any trade, business, profession or other occupation, or as the holder of any paid or unpaid office; and (2) the information in the document was supplied by a person who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with. We asked whether, if the information had passed through a chain of intermediaries, each of

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[17] See DP, paras 3.53-3.55.

[18] *R v Gwilliam* [1968] 1 WLR 1839, [1968] 3 All ER 821; *R v Patel* [1981] 3 All ER 94, 73 Cr App Rep 117.

[19] *R v Crayden* [1978] 1 WLR 604, [1978] 2 All ER 700.

[20] *Lord Advocate's Reference (No 1 of 1992), supra* at pp 742-743.

[21] Law Reform (Miscellaneous Provisions)(Scotland) Act 1966, c 19, s 7(1)(a) (repealed by the Civil Evidence (Scotland) Act 1988, c 32, s 10(1) and Sched).

[22] PACE, s 68(1)(a) (repealed by the Criminal Justice Act 1988, c 33, s 170 (2) and Sched 16).

[23] 1988 Act, s 24(1).

[24] *Ibid*, s 24(2).

[25] *Ibid*, s 24(1).

[26] *Ibid*, s 24 (4).

them should have received it in the course of a trade, etc.[27] We questioned whether any additional conditions applicable to the maker of the statement were necessary;[28] and we proposed that documents prepared in the course of a criminal investigation or for the purposes of pending or contemplated criminal proceedings against a particular person or persons should simply be excluded from any new business documents exception to the hearsay rule.[29] We also proposed that no special rules should be introduced to govern the admissibility of statements contained in documents produced by computers.[30]

2.7 The great majority of those who commented on our proposals were in general agreement that the 1965 Act should be repealed and replaced by a provision prescribing the two conditions of admissibility mentioned above as well as the condition as to intermediaries. There was also majority support for an updated version of the additional conditions applicable to the maker of the statement, and for the exclusion from any new business documents exception of documents prepared in the course of a criminal investigation or for the purposes of pending or contemplated criminal proceedings. The proposal that no special rules were needed for computer-generated evidence was unanimously accepted. As we shall explain in detail later, in framing our recommendations we have generally adopted the majority view. We have preferred the view of a minority, however, on the question of an updated version of the additional conditions applicable to the maker of the statement: we have concluded that such conditions are unnecessary.[31]

Principles of reform

2.8 In formulating our recommendations we have attempted to identify and keep in view the principles which should underlie any reform of the rule against hearsay. It has been observed that most of the exceptions to the rule

> "can be justified on one or other of the twin principles postulated by Wigmore, the necessity principle and the principle of circumstantial probability of trustworthiness. [Wigmore, *Evidence in Trials at Common Law*, Bk I, p 204, para 1421, 1422.] By the necessity principle Wigmore meant, to paraphrase him, that the admission of evidence was justified on the ground of necessity when it came from a source which would otherwise be lost or when it was such that we could not expect to get other evidence of the same value from the same or other sources. By circumstantial probability of trustworthiness he meant that the evidence was of a kind to which such a degree of probability of accuracy and trustworthiness attached as to make the reported statement an adequate substitute for evidence tested by cross-examination in the conventional manner."[32]

It has been submitted that necessity and circumstantial probability of trustworthiness, with their echoes of the best evidence rule, represent, along with a concern for fairness, important keys to both the understanding and the reform of the rule against hearsay: and that the main criticism of the rule is that it does not do full justice to the perception that not only may hearsay sometimes be the best available evidence but it may be better evidence than other

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[27] DP para 3.59, prop 6.
[28] DP para 3.63, prop 7.
[29] DP, para 3.66, prop 8.
[30] DP para 5.30, prop 15.
[31] See para 2.28 below.
[32] A B Wilkinson, "Hearsay: A Scottish Perspective" in *Justice and Crime: Essays in Honour of the Rt Hon the Lord Emslie* ed R F Hunter (1992, forthcoming) 66 at p 92.

evidence which is available, that is, the hearsay report may be superior in its evidentiary value to the testimony of the witness.[33]

2.9 Taking this approach to the reform of the rule against hearsay as it applies to business documents, we have endeavoured to make admissible statements in such documents which may be the only source of information about a particular matter or may be more valuable than any available oral evidence on the matter and which are likely, in view of the circumstances in which they were made or recorded, to be so reliable as to be an adequate substitute for oral evidence. In the interests of fairness, however, the party against whom the statement is adduced should be entitled to challenge the credibility and reliability of the statement, to lead evidence in contradiction of it and to make submissions as to the weight which should be attached to it.

Our recommendations in outline

2.10 We begin, accordingly, by accepting that before a statement in a document may be admissible as evidence of its truth "the principle of circumstantial probability of trustworthiness" should be preserved by a requirement of sufficient safeguards against unreliability. The safeguards which we propose are three-fold: (1) that the information in the statement should be derived from a person who had, or may reasonably be supposed to have had, direct personal knowledge of that information, (2) that the statement should have been made for the purposes of a business,[34] and (3) that the statement should be contained in a document kept by a business. The need for the first safeguard is, we think, self-evident. As to the second and third, the considerations that a statement is to be made for the purposes of a business and will be contained in a document kept by a business are strong incentives for accuracy in the preparation of both the statement and the document. We do not consider it necessary that the document should form part of a record or that there should be any condition that the person who was the source of the information should be unavailable for some specified reason.

2.11 The safeguards which we propose, although we think them sufficient, do not guarantee that the document will be reliable. We do not recommend, however, that the statement shuld be conclusive evidence of the truth of its contents, but only that it should be admissible as evidence of any fact of which direct oral evidence would be admissible. Accordingly, the proposals are not intended to supplant other existing rules of evidence: a statement in a document may be excluded on any ground of irrelevancy or incompetency on which objection may be taken to oral evidence, other than that it is hearsay. Moreover, taking account of the need for fairness, we propose that it should be possible for the party against whom the statement is tendered to attack the credibility of the person from whose personal knowledge the information in the document is derived, as far as possible in the same way as if he had given oral testimony. It would also be possible, as it is at present, for the party against whom the statement is tendered to explore in cross- examination of the witness speaking to the document in court the way in which the document has been compiled and to lead evidence in contradiction of that evidence or of the information contained in the document.

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[33] *Ibid*, at pp 93-94.

[34] Hereafter, unless otherwise indicated, the word "business" is used as a shorthand expression for any business, trade, profession or other occupation, any public or statutory undertaking, any local authority, any Government department and the holder of a paid or unpaid office. See para 2.23 below.

2.12 Finally, we propose that the new statutory exception for statements in business documents should be restricted in several ways: it should not extend to a statement in a precognition, or to any other statement made for the purposes of or in connection with pending or contemplated criminal proceedings or a criminal investigation, or to any statement made by an accused person which would not otherwise be admissible. On the other hand we recommend that the common law as to the admissibility of statements in documents should be preserved, by providing that nothing in our draft Bill should prejudice the admissibility of a statement not made by a person while giving evidence in court which is admissible otherwise than by virtue of the provisions of the Bill. We also make clear that our recommendations are concerned only with statements in business documents which contain or are derived from hearsay, and not with statements in which there is no element of hearsay. As we shall explain later, there is a category of statements in business documents produced by computer which are not hearsay and are therefore outside the scope of our recommendations.[35]

Our recommendation in detail

2.13 We now explain our recommendations in detail. We begin by recommending the repeal of the Criminal Evidence Act 1965, defining for the purposes of the new legislation the terms "criminal proceedings",[36] "statement"[37] and "document",[38] and explaining that the statement should be admissible in the same way as direct oral evidence.[39] After these preliminary matters we discuss the three safeguards of the reliability of the statement: that it should be have been made for the purposes of a business,[40] should be contained in a document kept by a business[41] and should have been based on personal knowledge.[42] We also note the conditions in which multiple hearsay would be admissible.[43] Next we deal with the practical consequences of the use of the statement in court: the establishment of the conditions of admissibility,[44] the extent to which the credibility of the supplier of the information in the statement may be the subject of evidence,[45] the circumstances in which additional evidence may be led[46] and the weight which may be attached to the statement.[47] We then discuss how our recommendations apply to statements in business documents which have been generated by a computer.[48] Finally we explain our view that there should not be any statutory provision conferring on the court a discretion to exclude evidence which would be admissible under our recommendations.[49] We therefore **recommend:**

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[35] See paras 2.50-2.57 below.
[36] See para 2.14 below.
[37] See para 2.15-2.17 below.
[38] See para 2.18 below.
[39] See para 2.20 below.
[40] See para 2.23 below.
[41] See paras 2.22, 2.23 below.
[42] See paras 2.24-2.26 below.
[43] See para 2.27 below.
[44] See paras 2.36, 2.37 below.
[45] See paras 2.38-2.44 below.
[46] See para 2.47 below.
[47] See paras 2.48, 2.49 below.
[48] See paras 2.50-2.57 below.
[49] See paras 2.58-2.63 below.

1. **The Criminal Evidence Act 1965 should be repealed and replaced by a new statutory "statements in business documents" exception to the hearsay rule.**

(Draft Bill, clause 6(5), Schedule[50])

"Criminal proceedings"

2.14 We recommend that any new provisions as to the admissibility of statements in business documents should apply not only to criminal proceedings but also to a hearing before the sheriff under section 42 of the Social Work (Scotland) Act 1968 of an application for a finding as to whether grounds for the referral of a child's case to a children's hearing are established, in so far as the application relates to the commission of an offence by the child. In our *Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* we expressed the view that the rules of evidence in such an application should be those applicable to criminal proceedings.[51] The Civil Evidence (Scotland) Act 1988 applies to hearings by the sheriff of applications under section 42 on other grounds. We therefore **recommend:**

2. **"Criminal proceedings" for the purposes of the "statements in business documents" exception should include a hearing by the sheriff under section 42 of the Social Work (Scotland) Act 1968 of an application for a finding as to whether grounds for the referral of a child's case to a children's hearing are established, in so far as the application relates to the commission of an offence by the child.**

(Draft Bill, clause 6(1)[52])

"Statement"

2.15 We recommend that the definition of "statement" should be the same as that in section 9 of the Civil Evidence (Scotland) Act 1988:

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

That definition gives effect to two of the views expressed in our *Report on Corroboration, Hearsay and Related Matters in Civil Proceedings*: that a statement made on precognition should remain inadmissible as evidence of any matter mentioned in the statement;[53] and that a hearsay statement of opinion should be admissible if the statement of opinion would be admissible if given in direct oral evidence by its maker.[54] As to statements made on precognition, it has often been pointed out that a precognition is not the witness's own narrative but a version by the precognoscer of the witness's answers to questions put by him; and that even if the precognoscer has not consciously tried to get the witness to tell his story in the way most favourable to the party in whose interest it is taken, it is likely that the precognition will be expressed in that way.[55] On consultation, a proposition in the

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[50] The 1965 Act is repealed by the Prisoners and Criminal Proceedings (Scotland) Bill, cl 45(3) and Sched 7, Pt I.
[51] (1986) Scot Law Com No 100, para 4.2.
[52] There is a similar provision in the Prisoners and Criminal Proceedings (Scotland) Bill, Sched 3, para 7.
[53] *Ibid*, para 3.57.
[54] *Ibid*, para 3.61.
[55] *Kerr v HMA* 1958 JC 14, 1958 SLT 82 *per* L J-C Thomson at pp 18-19, 84, *cit* DP, para 3.45.

Discussion Paper that statements on precognition should continue to be inadmissible[56] was supported by the majority but disagreement or reservations were expressed by some experienced consultees in the minority. Some considered that statements on precognition were more accurate than statements taken by the police, and others referred to the absence of an authoriative definition of the expression "precognition" and the difficulty in determining whether any given statement was of the nature of a precognition, a question which arises quite frequently in practice.[57] It might be possible to contemplate rules for the admissibility of statements on precognition in the event of changes in practice as to the way in which precognitions are taken. It might be suggested, for example, that where the statement had been fully and accurately recorded in question and answer form there would be no room for glosses by the precognoscer or for any doubt as to what the witness had said or the circumstances in which he had said it. No changes in the present law and practice were proposed in the Discussion Paper, however, and there was insufficient support for any changes on consultation.

2.16 In making representations of opinion admissible the Civil Evidence (Scotland) Act 1988 differs from the Criminal Evidence Act 1965 which applies only to statements which are representations of fact.[58] We see no reason why our proposals should not apply to statements of opinion as well as to statements of fact, provided that the statement of opinion would be admissible if given in direct oral evidence by its maker, a condition which we discuss below.[59] The effect of extending the definition of "statement" in that way would be to make hearsay evidence of an expert's opinion admissible under our proposed new regime for business documents, provided that such evidence satisfied the other conditions which we recommend.

2.17 We do not think it necessary to mention expressly in the definition any particular type of statement such as an instruction, order or request.[60] It will be open to the courts to give "statement" a wide meaning because the definition, through the use of the word "includes", is open-ended, and dictionary definitions of "statement" are very broad. They include:

> "Something that is stated; an allegation, declaration (1775). A written or oral communication setting forth facts, arguments, demands or the like (1787)."[61]

We accordingly propose the adoption of the definition in section 9 of the Civil Evidence (Scotland) Act 1988. It will be convenient, however, to add to that definition some further words in implementation of a later recommendation that there should be excluded from the "statements in business documents" exception any statement made by an accused person and any statement made for the purposes of or in connection with pending or contemplated

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[56] DP, paras 3.45, 3.46, prop 5.
[57] Recent cases include *HMA v McGachy* 1991 SCCR 884, 1991 SLT 921; and, under s 9 of the 1988 Act, *Highland Venison Mkt Ltd v Allwild GmbH* 1992 GWD 9-498; *Anderson v Jas B Fraser & Co Ltd* 1992 GWD 12-682; *F v Kennedy (No 2)* 1992 GWD 25-1401.
[58] Criminal Evidence Act 1965, s 1(4). The same definition of "statement" appears in s 6(1) of the (English) Evidence Act 1938 (1 & 2 Geo VI, c 28) and s 10(1) of the (English) Civil Evidence Act 1968, c 64. It was expanded to include statements of opinion by s 1(1) of the (English) Civil Evidence Act 1972, c 30 and imported into PACE (by s 72(1)) and the Criminal Justice Act 1988 (by s 28(2), Sched 2, para 5).
[59] See para 2.20 below.
[60] These are specified in the definition of "statement" in para 7 of Sched 3 to the Prisoners and Criminal Proceedings (Scotland) Bill.
[61] Shorter Oxford English Dictionary.

criminal proceedings or a criminal investigation. We discuss those categories of statements below.[62]

"Document"

2.18 As defined in clause 6(1) of the draft Bill "document" includes, besides documents in writing,

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

(b) any photograph;

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

(d) any film, negative, tape, disc or other device in which one or more visual images are recorded so as to be capable (as aforesaid) of being reproduced therefrom.

This provision (without the word "disc" in sub-paragraph (d)) also appears in section 9 of the Civil Evidence (Scotland) Act 1988, where it is intended to render admissible statements in documents of all kinds.[63] It takes account of the fact that nowadays information may be contained in such devices as discs, tapes or films, and may be conveyed by symbols or diagrams as well as by words or figures. The provision is wide enough, we think, to cover not only all existing but also future mechanical, electronic or other technological devices capable of producing or reproducing anything capable of being tendered in evidence. It is important that the provision be so phrased given the constant search for new and improved techniques for assembling, storing, evaluating and imparting information. The definition is more comprehensive than that in the 1965 Act where "'document' includes any device by means of which information is recorded or stored".[64] The Civil Evidence (Scotland) Act 1988 also provides by section 9 that "film" includes a microfilm. We consider that this provision should also be adopted.

2.19 We therefore **recommend:**

3. The definitions of "statement", "document" (expanded as noted in paragraph 2.18) and "film" in section 9 of the Civil Evidence (Scotland) Act 1988 should be adopted.

(Draft Bill, clause 6(1)[65])

Extent to which statement admissible

2.20 We recommend that a statement to which our recommendations apply should be admissible in criminal proceedings as evidence of any fact or opinion of which direct oral

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[62] See paras 2.32, 2.33 below.
[63] (1986) Scot Law Com No 100, para 3.62.
[64] s 1(4).
[65] The Prisoners and Criminal Proceedings (Scotland) Bill, Sched 3, para 7, contains the same definitions of "document" and "film" and a slightly fuller definition of "statement": see footnote to para 2.17 above.

evidence would be admissible. This recommendation basically follows the approach in the 1965 Act although, as indicated above,[66] unlike the 1965 Act it includes representations of opinion. The effect of our recommendation is that a statement contained in a document is admissible as evidence of any fact or opinion only if direct oral evidence of the particular matter given in court would be admissible. Accordingly the statement may be excluded on any ground on which objection may be taken to oral evidence, other than the fact that it is hearsay because it is a statement made other than in oral evidence in the proceedings.[67] With that qualification the admissibility of a statement in a document may be challenged in the same way and on the same grounds as the admissibility of direct oral evidence on the same matter by the supplier of the information, assuming that he was available as a witness.[68] We make recommendations later as to the leading of evidence which contradicts the statement or is relevant to the credibility of the supplier of the information,[69] and as to the making of submissions regarding the weight to be attached to the statement.[70] We **recommend:**

4. A statement to which the following recommendations apply should be admissible as evidence of any fact or opinion of which direct oral evidence would be admissible.

(Draft Bill, clause 1(2)[71])

Safeguards of reliability

2.21 We now make our recommendations as to the safeguards of the reliability of the statement. The first safeguard is that the information in the statement should have been derived from a person who had, or may reasonably be supposed to have had, direct personal knowledge of that information; the second, that the statement should have been made for the purposes of a business; and the third, that the statement should be contained in a document kept by a business. The object of these safeguards is to restrict admissibility to statements made in good faith by persons who knew the subject-matter of their statements and had a strong incentive to be accurate because they made their statements for business purposes and the statements were sufficiently important to the efficient running of a business for the business to keep the documents in which the statements were contained. Such statements will be generally more reliable than oral evidence at the trial by the makers of the statements, especially where they are contemporaneous statements about complex transactions or unexceptional matters of daily occurrence which the makers could be expected to remember only inaccurately, if at all. If, for example, the employees who supplied the information for the records in *Myers*[72] had testified, they would have been unable to remember the numbers[73] and could only have said that they had no incentive to

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[66] See para 2.15 above.
[67] It would be a valid objection that the statement itself contained hearsay, other than the multiple hearsay admitted under a later recommendation (see para 2.27 below), which did not fall within an exception to the hearsay rule. Cf *The Ymnos* [1981] 1 Lloyd's Rep 550.
[68] The supplier of the information should have been a competent witness when the information was supplied: *Taylor v Taylor* [1970] 1 WLR 1148, [1970] 2 All ER 609 *per* Davies L J at pp 1154, 614. In the ordinary case of information supplied by a responsible employee or office-holder no question as to his competence should arise. Where, however, the supplier is a child or suffers from some degree of mental incapacity, his competence may have to be established: *F v Kennedy 1992 SCLR 139.*
[69] See paras 2.38-2.46 below.
[70] See paras 2.48, 2.49 below.
[71] Para 2(1) of Sched 3 to the Prisoners and Criminal Proceedings (Scotland) Bill is in similar terms.
[72] [1965] AC 1001. See para 2.3 above.
[73] They might have been allowed to refer to the records "to refresh their memories" - a transparent fiction.

make false records, and that the chances of their having made more than the odd error were remote.[74] Other jurisdictions have made provision for the admissibility of statements in business documents on the ground of their presumed reliability.[75]

2.22 **Statement in document kept by a business.** It will be convenient to consider first the condition that the statement should be contained in a document kept by a business. In our draft Bill this condition is expressed as follows in clause 1(1)(a):

> "1.-(1) This section applies to a statement which -
>
> (a) is contained in a document that comprises or forms part, or at any time comprised or formed part, of the documents kept-
>
> (i) by a business or undertaking; or
>
> (ii) by or on behalf of the holder of a paid or unpaid office."

We have avoided using the word "record" which, as we have noted, has been restrictively interpreted.[76] We have already referred to our very comprehensive definition of "document".[77] Clause 1(1)(a) provides that the document in which the statement is contained must be, or must have been at some time, kept by a business. It may comprise the whole documents kept by the business if the business stores all its information in one device which falls within the definition of "document".[78] The document may be kept by, firstly, "a business or undertaking". These expressions are broadly defined by clause 6(1) in terms virtually identical to those in the Civil Evidence (Scotland) Act 1988: "business" includes "trade, profession or other occupation"[79] and "undertaking" includes "any public or statutory undertaking, any local authority and any Government department". Secondly, the document may be kept by or on behalf of "the holder of a paid or unpaid office". This expression[80] is intended to cover such persons as an office-bearer in an entity which is neither a business nor an undertaking, such as a charity, kirk session or club, who may keep documents for the purpose of the efficient discharge of his functions. On the other hand, documents kept by an individual merely for personal or other private purposes, such as diaries or records compiled in pursuit of a hobby, are excluded.

2.23 **Statement made for business purposes.** The condition that the statement should have been made for the purposes of a business is prescribed in clause 1(1)(b) which provides that the statement must have been -

> "made or recorded in the document in the course of, or for the purposes of, a business or undertaking or in pursuance of the functions of such a holder."

A statement is made in a document if it only comes into existence when it is stated in the document - as when a writer forms a sentence in his mind and writes it on paper, or a

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[74] Di Birch, "The Criminal Justice Act 1988: (2) Documentary Evidence" [1989] Crim L R 15 at pp 17-18.
[75] eg Criminal Justice Act 1988, s 24 (England and Wales); Federal Rules of Evidence, r 803(6) (USA).
[76] See para 2.4 above.
[77] See para 2.18 above.
[78] A computer database was held to be a "document" within the meaning of RSC Ord 24 in *Derby & Co Ltd v Weldon* (No 9) [1991] 1 WLR 652 and *Alliance & Leicester Building Society v Ghahremani*, "The Times" 19 March 1992.
[79] The 1988 Act definition includes only "trade or profession".
[80] This expression has been used in English legislation: the Civil Evidence Act 1968, c 64, s 4(3); PACE, s 70(1), Sched 3, para 6 (repealed by the Criminal Justice Act 1988, s 170(2) and Sched 16); the Criminal Justice Act 1988, s 24(1).

computer does a calculation and prints out the result. A statement is recorded in a document when it has already been made, either orally or in another document, and is then reproduced in the document. We have deliberately used the indefinite article in the phrase "for the purposes of, a business or undertaking" and the expression "such a holder" in order to show that the business, undertaking or holder in clause 1(1)(b) is not necessarily the same as that in clause 1(1)(a). Thus, where a statement is made in a document for the purposes of business A and fulfils the "personal knowledge" condition which we discuss below,[81] and the document is received and kept by business B, the statement will be admissible. Although the statement was not made for the purposes of business B it is nevertheless *prima facie* reliable because it fulfils the three conditions of having been made for business purposes, having been derived from personal knowledge, and having been of sufficient importance to be kept by a business.

2.24 **Statement based on personal knowledge.** The condition that the information in the statement should have been derived from a person who had, or may reasonably be supposed to have had, direct personal knowledge of that information is contained in clause 1(2), which provides that the statement must have been made -

> "(a) by a person who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in it; or
>
> (b) on the basis of information directly or indirectly supplied by a person who had or may reasonably be supposed to have had personal knowledge of those matters."

Sub-paragraph (a) deals with a situation in which the maker of the statement and the supplier of the information are the same person, and sub-paragraph (b) with a situation in which they are different persons. If a person, A, who has observed something at first hand and accordingly acquired personal knowledge of it, sets out in a document the information which he has thus obtained, he thereby makes a statement in a document which falls within sub-paragraph (a). The statement is also "made … in the document" in terms of clause 1(1)(b). If, however, instead of setting out the information in a document himself, A communicates the information to another person, B, and B sets it out in a document, A is the supplier of the information, B is the maker of the statement in the document and the statement in the document, "made … on the basis of information directly … supplied" by A to B, falls within sub-paragraph (b). This statement is "recorded in the document" in terms of clause 1(1)(b).

2.25 The sub-paragraphs also cover more complex situations. The information in the document may be derived from the personal knowledge of more than one "person", since the singular includes the plural.[82] Further, it is sufficient that the person "may reasonably be supposed to have had" personal knowledge of the matter dealt with in the statement. There is no requirement that the person should be identifiable as a particular named individual: all that the party tendering the statement need to do in order to satisfy this condition is to establish circumstances from which a reasonable supposition of his possession of personal knowledge may be inferred. Thus, workmen such as those who supplied the information in *Myers*[83] are persons who may reasonably be supposed to have had such knowledge. Again,

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[81] See paras 2.24-2.26 below.
[82] Interpretation Act 1978, c 30, s 6(c).
[83] [1965] AC 1001. See para 2.3 above.

the form and contents of the document may be such that the inference may be drawn from them.[84] Section 1(2) of the Criminal Evidence Act 1965 and paragraph 14 of Schedule 3 to the Police and Criminal Evidence Act 1984 provide that for the purpose of deciding whether or not a statement is admissible as evidence by virtue of the relevant provision, the court may draw any reasonable inference from the form or content of the document in which the statement is contained. Paragraph 14 adds that such an inference may also be drawn from the circumstances in which the statement was made or otherwise came into being, or from any other circumstances. Such provisions appear to us to be inappropriate since we consider it to be clear that reasonable inferences may be drawn from any relevant circumstances as a matter of common sense, without statutory authority.[85]

2.26 The provision in sub-paragraph (b) that the statement must have been made "on the basis of information … supplied by a person" covers such matters as a statement in a document produced by a computer as a result of its processing of information entered by its operator. Such a statement, unlike a statement in sub-paragraph (a), need not be made "by a person", and is made "on the basis of" the information supplied and is not simply a reproduction of it because the computer has done something with it, such as a calculation. The phrase "information … indirectly supplied" covers a case where the information on which the statement is based has passed through a chain of intermediaries between the supplier of the information and the maker of the statement, a situation considered in the next paragraph.

2.27 **Multiple hearsay.** Where the person who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the statement has supplied the information to the maker of the statement through an intermediary or a succession of intermediaries, it is necessary to safeguard the reliability of the process of transmission. We propose that this should be done by requiring that each person through whom the information was supplied should have been acting in the course of a business (not necessarily the same business). Here we depart slightly from our proposition in the Discussion Paper, which was that each person in the chain should have "received" the information in the course of a business.[86] This formula was approved by a substantial majority of those who commented on the proposition, and is adopted both in section 24(2) of the Criminal Justice Act 1988 and in paragraph 2(2) of Schedule 3 to the Prisoners and Criminal Proceedings (Scotland) Bill. Upon further consideration, however, we consider that it would be a more valuable safeguard against the risk of distortion of the information in transmission[87] if the intermediary was acting in the course of a business both when he received the information and when he passed it on, since the accuracy of the information when it left him is as important as its accuracy when he received it. Whichever formula is selected, any risk of distortion which might be shown to have been inherent in the transmission of the information in any particular statement would be a matter to be taken into account in assessing the weight to be attached to that statement.

2.28 **Other safeguards.** In the Discussion Paper we drew attention to the conditions imposed by the Criminal Evidence Act 1965 as to the supplier of the information: that he

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[84] Cf *Knight v David* [1971] 1 WLR 1671, [1971] 3 All ER 1066; *R v Schreiber and Schreiber* [1988] Crim L R 112.
[85] In *R v Feest* [1987] Crim L R 766 the Court apparently overlooked PACE, s 70(3), Sched 3, para 14, but held that in proper circumstances a court could draw an inference from the form of the document.
[86] DP, paras 3.58, 3.59, prop 6(2).
[87] There is no requirement in either formula that the transmission should be in documentary form. In some circumstances such a requirement might stultify the scheme.

should be dead, abroad or unfit to attend, or that he cannot be found or cannot reasonably be expected to have any recollection of the matters dealt with in the statement.[88] We sought views on whether any updated version of these conditions should appear in any restatement of the "statements in business documents" exception to the hearsay rule.[89] The majority of those who responded favoured the inclusion of such conditions. We have been persuaded, however, by the arguments of experienced consultees in the minority who maintained that such conditions were unnecessary. They pointed out that the documents under consideration were business documents which in many if not most cases will have been used and relied upon for business purposes by those engaged in the business, and it was not readily to be assumed that they would be inaccurate. We have become convinced that this argument is sound. To add such conditions, which in effect require the supplier of the information to be produced or his unavailability to be accounted for, would be to indicate a clear preference for oral evidence if it were available. In many cases, however, the oral evidence of the supplier of the information would be unreliable or at least unhelpful: he would be unlikely to remember accurately the information in the statement, or to be able to say more than that he had tried to supply the information carefully and had had no reason to supply false information. It appears to us that the safeguards which we have discussed in earlier paragraphs are sufficient and that the addition of such further conditions would not serve any useful purpose.

2.29 We now bring together our recommendations as to safeguards of reliability. We **recommend:**

5. A statement contained in a document should be admissible in criminal proceedings as evidence of any fact or opinion of which direct oral evidence would be admissible if -

(a) the statement is contained in a document that comprises or forms part, or at any time comprised or formed part, of the documents kept by a business or undertaking, or by or on behalf of the holder of paid or unpaid office;

(b) The statement was made or recorded in the document in the course of, or for the purposes of, a business or undertaking or in pursuance of the functions of such a holder; and

(c) the maker of the statement, or the supplier of the information on the basis of which the statement was made had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in it.

(Draft Bill, clause 1(1), (2)[90])

[88] 1965 Act, s 1(1)(b), set out in para 2.3 above.

[89] DP, paras 3.60-3.63, prop 7.

[90] Para 2(1) of Sched 3 to the Prisoners and Criminal Proceedings (Scotland) Bill is in similar terms except to the extent noted in paras 2.31, 2.32 below.

6. **Where a statement has been made on the basis of information indirectly supplied, it should not be admissible unless each person through whom the information was supplied was acting in the course of a business or undertaking or as or on behalf of the holder of a paid or unpaid office.**

(Draft Bill, clause 1(3)[91])

7. **No version of the conditions in section 1(1)(b) of the Criminal Evidence Act 1965 should be applicable to statements admissible by virtue of the "statements in business documents" exception.**[92]

Statements excluded

2.30 We notice here certain categories of statements in documents which fall outside the scope of our recommendations. These are: statements in documents received by a business;[93] statements by accused persons;[94] and statements made in connection with criminal proceedings or investigations.[95]

2.31 **Statements in documents received by a business.** Section 24 of the Criminal Justice Act 1988 and paragraph 2 of Schedule 3 to the Prisoners and Criminal Proceedings (Scotland) Bill, which are concerned with the admissibility of statements in business documents, specify conditions as to personal knowledge and the keeping of the document by a business, but they make a statement in a document admissible if it was "created or received" in the course of, or for the purposes of, a business.[96] This condition may be contrasted with our recommended requirement that the statement should have been "made or recorded … in the course of, or for the purposes of, a business".[97] We decided not to recommend a requirement that the document should have been "created or received" as in the 1988 Act and the Bill for the following reasons. First, the requirement adds to the concepts of making a statement and supplying information, which are already in these provisions, the further concept of the creation of a document, which appears to us to be unnecessary. The second and more important reason, however, is that a statement in a document which is admissible only because it was *received* by a business (as well as fulfilling the conditions as to personal knowledge and being kept by a business) lacks the safeguard that it was *made for the purposes of* a business. Thus, a statement in a document, whatever the circumstances in which it had been made, would be admissible as evidence of the matter stated in it simply because the maker of the statement might reasonably be supposed to have had personal knowledge of the matters dealt with and the document had been received and kept by a business. On this basis, it has been pointed out, all the letters to the Editor of *The Times* would be admissible,[98] as would statements in books received by a bookseller in the course of his trade.[99] Again, if someone, not in the course of a business, made from his

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[91] Para 2(2) of Sched 3 *supra* differs to the extent noted in para 2.27 above.
[92] There are no such conditions in Sched 3 *supra*.
[93] See paras 2.31, 2.32 below.
[94] See para 2.33 below.
[95] See para 2.34 below.
[96] 1988 Act, s 24(1): "the document was created or received by a person in the course of a trade [etc]"; Prisoners, etc Bill, Sched 3, para 2(1)(a): "the document was created or received in the course of, or for the purposes of, a business [etc]".
[97] See para 2.23 above.
[98] Di Birch, "The Criminal Justice Act 1988: (2) Documentary Evidence" [1989] Crim L R 15 at p 25.
[99] M Ockelton, "Documentary Hearsay in Criminal Cases" [1992] Crim L R 15 at pp 17-18.

personal knowledge the same statement in two identical document and sent one to A who received it in the course of a business and another to B who received it but not in the course of a business, the statement in the former document would be admissible but not that in the latter. We would adopt the following observations which were made in relation to section 24 of the 1988 Act:[100]

> "… why it should be a safeguard that a document be 'received' in the course of a trade etc is something of a mystery. If there is no control over the method by which the document was created, the question remains as to whether the information supplied was accurately stated in the document, a question which cannot be answered merely by reference to the requirement of personal knowledge on the part of the supplier of the information under s 24(1)(ii). The purpose of s 24(1)(i) and earlier equivalents is to ensure that the information supplied (however accurate when supplied) should have been stated accurately in the document. If the subsection required that the receiver must have verified the contents of any document received, or if it were intended that the document should have been received from a commercial, professional or similar source, the position might be different. But in such a case, presumably the manner of its creation could be relied upon, and the provision about its receipt would be otiose."

The last point in that quotation is apposite to our scheme under which, as we have observed,[101] a statement made on the basis of personal knowledge for the purposes of one business which is contained in a document received and kept by another business would be admissible.

2.32 It is also necessary, when framing evidence provisions for criminal proceedings, to take account of statements made by accused persons. The "documents received" requirement appears to make admissible, by an unintended side-wind, statements which for good reasons are inadmissible under the present law, as the following example may illustrate. A and B have acted in concert to defraud a company. Before the fraud is discovered, and thus before any criminal proceedings are contemplated,[102] the company in the course of its business receives and keeps a letter from A in which he advises them of the fraud, exonerates himself and implicates B. Since the facts stated by A about the fraud are the same as the facts discovered by the company after receiving the letter, A may reasonably be supposed to have had personal knowledge of the matters dealt with in the letter. Later, A and B are tried together. At the trial, A would be entitled to give direct oral evidence exculpating himself and implicating B (assuming that A had lodged a notice under section 82(1) of the Criminal Procedure (Scotland) Act 1975). A's statement in the letter having been made from personal knowledge, and the letter having been kept by the business, A's statement would be admissible as evidence of any fact of which direct oral evidence would be admissible. A's counsel founds on A's statement in the letter and does not put A into the witness box.[103] This would be an important change in the law: under the present law, if concert is not proved, A's statement in the letter would be inadmissible against B because it was a statement by A, incriminating his co-accused B, made outwith the presence of B.

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[100] P Murphy, *A Practical Approach to Evidence* (3rd ed, 1988), p 274.
[101] See para 2.23 above.
[102] See para 2.34 below.
[103] A therefore could not be cross-examined as to his bad character or previous convictions in terms of proviso (f)(iii) to section 141 or 346(1) of the 1975 Act, although evidence relevant to his credibility might be led in terms of para 1 of Sched 2 to the 1988 Act or para 2(3) of Sched 3 to the Bill: see paras 2.38-2.45 below.

2.33 **Statements by accused persons.** Our recommendations are intended to deal only with statements in business documents and to have no implications for other areas of the law of evidence. In particular, they are not intended to affect the present law as to statements by accused persons. We consider that there should be a specific provision to that effect in order to avoid undesirable results. To change slightly the example given in the previous paragraph: suppose that A and B are fellow-employees who conspire to defraud their employers; the manager, suspecting some irregularity, asks A to write a report; and A writes a report revealing the fraud, exonerating himself and implicating B. The report would be a document made for the purposes of, and kept by, the business, and A would have personal knowledge of the matters dealt with in it. Under our recommendations the report, in the absence of any prohibition, would be admissible at the trial of A and B, with the same consequences as the letter in the previous example. We therefore **recommend:**

> **8. The "statements in business documents" exception should expressly exclude the admission, under that exception, of statements made by accused persons.**

(Draft Bill, clause 6(2)[104])

2.34 **Criminal proceedings and investigations.** We have already recommended that the "statements in business documents" exception to the hearsay rule should not apply to a statement in a precognition[105] or to a statement made by the accused.[106] We now recommend that it should be made clear that the exception does not cover statements made for the purposes of or in connection with a criminal investigation or pending or contemplated criminal proceedings. In England and Wales the Criminal Justice Act 1988 makes such statements admissible subject to a number of special conditions.[107] We consider, however, that it would be simpler to exclude them completely from the scope of the exception for statements in business documents. As we have mentioned,[108] a proposition to that effect in the Discussion Paper[109] attracted majority support on consultation. It is not intended that, for example, a witness's statement recorded in a police officer's notebook should be admissible on the ground that it was made on the basis of information supplied by someone with personal knowledge and was recorded and kept by the police officer in the course of his profession. On the other hand, any statements which are admissible under the present law would continue to be admissible, since our recommendations are not designed to make inadmissible any hearsay which is admissible at present. Nor does the prohibited category of statements include statements in documents kept other than in connection with criminal investigations or proceedings, such as statements in statistical records which are made and kept with no particular investigation or proceedings in view. We **recommend:**

> **9. The "statements in business documents" exception should expressly exclude the admission, under that exception, of any statement made for the**

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[104] There is no corresponding provision in the Prisoners and Criminal Proceedings (Scotland) Bill, Sched 3.
[105] See para 2.15 above.
[106] See para 2.33 above.
[107] 1988 Act, ss 24(4), 26.
[108] Para 2.7 above.
[109] DP, paras 3.64-3.66, prop 8.

purposes of or in connection with pending or contemplated criminal proceedings or a criminal investigation.

(Draft Bill, clause 6(1)[110])

10. **Nothing in the statutory provisions enacting the exception should prejudice the admissibility of any evidence that would be admissible apart from these provisions.**

(Draft Bill, clause 6(3)(a)[111])

The statement in court

2.35 In the following paragraphs we consider the practical aspects of the use of the statement in the courtroom: the establishment of the three safeguards, or conditions of admissibility; the extent to which the credibility of the supplier of the information may be the subject of evidence; the circumstances in which additional evidence may be led; and the weight to be attached to the statement.

2.36 **Proof of conditions of admissibility.** Since any statement in a document is a species of hearsay, it is not admissible as evidence of any matter stated in it unless it comes within the scope of a common law or statutory exception to the hearsay rule. It is for the party tendering the statement to establish that it falls within the scope of the exception, if that is not admitted by his opponent. Thus, in the absence of formal admission a party who wishes to adduce a statement on the basis that it falls within the "statements in business documents" exception will have the burden of establishing the statutory conditions for the admissibility of such a statement, that is, shortly put, that the statement was based on the personal knowledge of the supplier of the information, was made for business purposes and is contained in a document kept by a business. We recommend below that the latter condition should be capable of being established by certificate.[112] The nature of any evidence required to establish the first two conditions will depend on the circumstances of the case. We have already noted that it may be possible to draw a reasonable inference as to the "personal knowledge" condition from the circumstances in which the statement was made or otherwise came into being or from other circumstances such as the form or contents of the document.[113]

2.37 The opponent of the party tending the document would be entitled to challenge any evidence led as to the admissibility conditions and to lead evidence in contradiction of it. The question whether the conditions were satisfied would be a matter for the judge, like any other question of admissibility (apart from the admissibility of a confession). We do not consider it necessary to make any observations about standards of proof[114] or to contemplate the use of the trial-within-a-trial procedure which has very seldom[115] been resorted to in

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[110] There is a similar provision in the Prisoners and Criminal Proceedings (Scotland) Bill, Sched 3, para 7.
[111] Sched 3, *supra*, para 6(1)(a) contains a similar provision.
[112] See para 3.2-3.6 below.
[113] See para 2.25 above.
[114] Cf *R v Minors, R v Harper* [1989] Crim L R 360, commentary at p 363; Phipson on *Evidence* (14th ed, 1990) para 4-37; Cross, p 172.
[115] In *Morley v HMA* 1981 SCCR 250 a trial-within-a-trial was held to determine the admissibility of evidence of identification. In *Edwards v HMA* 2 May 1991, Crown Office Circular A23/91, reported only in 1991 GWD 24-

Scotland[116] in order to determine questions as to the admissibility of evidence other than evidence of confessions. Indeed we would expect that in many cases the fact that the admissibility conditions were satisfied would be a matter of admission or would be established at a preliminary diet[117] or under the procedure for proof of undisputed facts which we recommend in Part IV.

2.38 **Credibility of maker or supplier.** We noted above that one of the keys to the reform of the rule against hearsay should be a concern for fairness.[118] Where a statement in a business document has been adduced as evidence and the conditions of admissibility have been satisfied, the probative value of the statement will depend on the credibility and reliability[119] of the person from whose personal knowledge the information in the statement is derived. Where that person has himself set out the information in the document, we refer to him as the maker of the statement: where he has communicated the information to another, he is referred to as the supplier of the information.[120] It follows from what we have already said about the presumed reliability of statements in business documents that there would very seldom be anything to gain by examining the makers or suppliers as witnesses in court.[121] There would also be many cases in which the maker or supplier could not be identified as a named individual, so that any attack would necessarily be confined to a criticism of his reliability, for example by exploring the question whether anyone in the position in which he must have been placed could have had a sufficient opportunity to observe accurately the matters about which he purports to have had personal knowledge. The fact remains, however, that if the maker or supplier had been called as a witness, the party against whom the statement is tendered would have had an opportunity to cross-examine him as to his credibility and reliability. It is therefore important, in the interests of fairness, to take account of the absence of that opportunity by enabling the opposing party, as far as possible, to attack the credibility and reliability of the maker or supplier on the same grounds as would have been available if he had been called as a witness. Subsection (4) and (5) of clause 1 of our draft Bill are accordingly designed to make certain evidence admissible for that purpose. Subsection (4) explains that subsection (5) applies where a statement is admitted which has been made either by a person with personal knowledge ("the maker") or on the basis of information supplied by such a person ("the supplier").

2.39 Subsection (5)[122] contains three sub-paragraphs which we shall set out and explain in turn. It begins:

> "Where this subsection applies -
>
> (a) any evidence which, if the maker or (as the case may be) the supplier had been called as a witness, would have been admissible as relevant to his

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1360, the Court observed that it was within the discretion of the trial judge to determine whether to hold a trial-within-a-trial.

[116] Cf *R v Nicholls* (1976) 63 Crim App R 187; *R v Minors, R v Harper* (1989) 89 Crim App R 102.

[117] 1975 Act, s 76(1) as proposed to be amended by cl 38 of the Prisoners and Criminal Proceedings (Scotland) Bill. See para 4.19 below.

[118] See paras 2.8, 2.9 above.

[119] A witness is credible if he is honestly doing his best to tell the truth as he remembers it, and is reliable if his evidence is accurate.

[120] See para 2.24 above.

[121] See paras 2.9, 2.10, 2.21 above.

[122] Subs (5) is modelled on the Criminal Justice Act 1988, Sched 2, para 1, which is derived from PACE, Sched 3, para 3, derived in turn from the Civil Evidence Act 1968, s 7, which is based on a recommendation by the Law Reform Committee, *Thirteenth Report (Hearsay Evidence in Civil Proceedings)* (1966, Cmnd 2964), para 33.

> credibility as a witness shall be admissible for that purpose in those proceedings."

Thus, evidence will be admissible if it would have been admissible as relevant to the credibility of the maker or supplier if he had been called as a witness. The law as to the admissibility of such evidence seems to be less clear in Scotland than it is in England and Wales. It appears that in England and Wales evidence admissible under sub-paragraph (a) may include evidence of bias, previous convictions, bad reputation for veracity or mental or physical condition tending to show unreliability,[123] all of which would tend to reflect unfavourably on his credibility; and evidence of a previous consistent statement by the witness, which is admissible in order to rebut a suggestion that his evidence has been fabricated.[124] The law of Scotland by contrast seems to be somewhat uncertain. It has been suggested[125] that there is a general rule that evidence of facts affecting the credibility of a witness may not be led from another witness, except where those facts are also relevant to the questions at issue, or where the other witness is speaking to a previous inconsistent statement (a matter covered by sub-paragraph (c)).[126] There seems to be no modern authority which supports such a general rule, however, and the older authorities are not unanimous.[127] In modern times the court has admitted evidence that a witness suffered from a condition which could affect the reliability of her testimony,[128] and in the Inner House reference has been made without adverse comment to the decision of the House of Lords in an English criminal appeal that medical evidence concerning illness or abnormality affecting the mind of a witness and reducing his capacity to give reliable evidence may in appropriate cases be admissible.[129]

2.40 There appears to be a further general rule in criminal cases[130] that evidence may not be led that a witness had previously made a statement which is consistent with his evidence in the witness box. It is not clear, however, whether such evidence may be led when the witness's credibility is impugned.[131] There are a few indications, most of them in civil cases decided before the Civil Evidence (Scotland) Act 1988, that such evidence is admissible for the purpose of supporting the witness's credibility.[132] In 1980 this Commission proposed that if the credit of a witness is impugned on a material fact, on the ground that his account is a late invention, evidence of an earlier statement by the witness to the same effect should be admissible.[133] All those who commented on that proposition agreed with it, but the law remains uncertain. Sub-paragraph (a) accordingly leaves room for the development of the law as to the admissibility of evidence both to support and to attack the credibility of a witness.

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[123] A Keane, *The Modern Law of Evidence* (2nd ed, 1989), p 261; Cross, p 551.
[124] Keane, *supra*, pp 107-108, 261.
[125] A G Walker and N M L Walker, *The Law of Evidence in Scotland* (1964), p 7, para 7(b).
[126] See paras 2.43, 2.44 below.
[127] See *Encyclopaedia*, vol 10, para 636.
[128] *Green v HMA* 1983 SCCR 42 (evidence led on appeal). See also *HMA v Gilgannon* 1983 SCCR 10 (medical evidence as to accused's mental state led at trial-within-a-trial).
[129] *McKinlay v British Steel Corporation* 1988 SLT 810 at p 813 *per* L J-C Ross citing *R v Toohey* [1965] AC 505.
[130] In civil cases a witness's previous statement (other than one in a precognition) is admissible both as evidence of any matter contained in it and as supporting or attacking his credibility: Civil Evidence (Scotland) Act 1988, ss 2(1)(b), 3, 9.
[131] This topic is discussed in I D Macphail, *Evidence* (1987), paras 19.38-S19.40A.
[132] *Harrison v Mackenzie* 1923 JC 61, 1923 SLT 565 *per* L J-C Alness at pp 64, 567; *Gibson v National Cash Register Co* 1925 SC 500, 1925 SLT 377; *Barr v Barr* 1939 SC 696, 1939 SLT 465 *per* L P Normand at pp 699, 468; *Burns v Colin McAndrew and Partners Ltd* 1963 SLT (Notes) 71.
[133] *Law of Evidence* (1980) Scot Law Com Memo No 46, para T.16.

2.41 Sub-paragraph (b) provides:

> "(b) evidence may be given of any matter which, if the maker or supplier had been called as a witness, could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examining party."

For the purpose of attacking his credibility a witness may be questioned as to his character. At common law his reply to such a question must be accepted and evidence in contradiction of his reply is excluded.[134] The object of that rule is to avoid spending time on the investigation of a collateral issue.[135] There is an exception to the rule where the question relates to a previous inconsistent statement by the witness, a matter separately dealt with in sub-paragraph (c).[136] In practice the rule is also qualified where in cross-examination by the defence a witness falsely denies that he has a previous conviction for a crime or offence involving dishonesty: it is the practice of the Crown to demonstrate the false denial in re-examination by producing, if necessary, a relevant extract conviction.[137]

2.42 There are two views as to how this rule should be adapted to a situation in which a party against whom a statement in a business document is adduced would have wished to cross-examine the maker or supplier as to his credibility if he had been called as a witness. On one view, any evidence of any matter as to which his denial would have been final should be excluded. This is the rule in section 7 of the (English) Civil Evidence Act 1968, which thus preserves the English general rule as to finality on collateral issues. Another view is that that rule places the opposing party at an unfair disadvantage in a case where the maker or supplier, if appearing as a witness, would have admitted the discreditable conduct or would have denied it in an unconvincing way: accordingly, evidence as to the matter to his discredit should be admissible. The solution in the Criminal Justice Act 1988 is to allow the evidence subject to the leave of the court.[138] The object of the requirement of leave is to avoid the admission of evidence which might be unfair to the maker of the statement, who could not personally defend himself from attacks on his credibility, or which might be presented at such length that the trial would be unduly protracted.[139] The conclusion at which we have arrived is that the primary consideration is the avoidance, as far as possible, of any unfairness to the opposing party, and that accordingly the evidence should be admissible. We do not consider it appropriate that it should be admissible subject to the leave of the court. For reasons which we explain later,[140] we are of the view that in general there should not be any statutory discretion to exclude evidence rendered admissible in terms of the "statements in business documents" exception to the hearsay rule.

2.43 Sub-paragraph (c) provides:

> "(c) evidence tending to prove that the maker or supplier, whether before or after making the statement or supplying the information made (whether orally or not) a statement which is inconsistent with it shall be admissible for the purpose of showing that he has contradicted himself."

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[134] W J Lewis, *Manual of the Law of Evidence in Scotland* (1925), p 233.
[135] Walker and Walker, *supra*.
[136] See paras 2.43, 2.44 below.
[137] *Criminal Procedure in Scotland (Second Report)* (1975, Cmnd 6218), para 27.02; *HMA v Ashrif* 1988 SCCR 197 at p 207.
[138] Criminal Justice Act 1988, s 28(2), Sched 2, para 1(b).
[139] Criminal Law Revision Committee, *Eleventh Report: Evidence (General)* (1972, Cmnd 4991), para 263.
[140] See paras 2.58-2.63 below.

A witness may be asked whether he has on any specified occasion made a statement on any matter pertinent to the issue at the trial different from the evidence given by him in the trial; and if he denies that he has done so, evidence may be led to prove that he did not make such a statement on the occasion specified.[141] Evidence of the statement is admissible only for the purpose of indicating that the witness's testimony in court is unreliable: it is not evidence of the truth of the facts stated in it.

2.44 Sub-paragraph (c) adapts these rules to a situation in which a maker of, or a supplier of information in, a statement in a business document has made a statement inconsistent with that information. Evidence of the inconsistent statement would be admissible under sub-paragraph (a), but separate provision is made in sub-paragraph (c) for the sake of clarity. Further, the expression "relevant to his credibility as a witness", used in sub-paragraphs (a) and (b), does not appear in sub-paragraph (c), which provides that the inconsistent statement "shall be admissible for the purpose of showing that he has contradicted himself" and thus covers a situation in which a perfectly honest person has made an inconsistent statement by mistake. In such a case, accordingly, it is the reliability rather than the credibility of the maker or supplier which may be attacked. Further, he may have made the inconsistent statement before or after[142] he supplied the information, and he may have made it orally or otherwise. The party against whom the statement in the document is adduced has the advantage not only of leading evidence of the inconsistent statement but also of the fact that the maker or supplier, being absent, cannot explain the inconsistency. On the other hand the inconsistent statement is not admissible as evidence of its truth unless it falls within an exception to the hearsay rule, for example by being contained in another business document.

2.45 **Consequences of defence attack on credibility of maker or supplier.** If the accused attacks the credibility of a prosecution witness, he becomes liable to be cross-examined as to his bad character or previous convictions under proviso (f)(ii) to section 141(1) or 346(1) of the 1975 Act.[143] If, however, a statement in a business document is adduced by the prosecution and the accused attacks the credibility of the maker or supplier by virtue of any of the provisions of subsection (5), he cannot be so cross-examined because the proviso protects him from such cross-examination "unless … the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of the witnesses for the prosecution". While the maker or supplier may be a witness for the prosecution in effect, he is not so in fact; and in English cases the words "the prosecutor or … the witnesses for the prosecution" have been given their natural meaning.[144]

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

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[141] 1975 Act, ss 147, 349.

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

[143] *Leggate v HMA* 1988 SCCR 391, 1988 SLT 665.

[144] *R v Westfall* (1912) 7 Crime App R 1976; *R v Biggin* [1920] 1 KB 213.

11. Where a statement in a business document is admissible, the following evidence relative to the maker of the statement or the supplier of the information contained in the statement should be admissible:

(a) evidence which would have been admissible as relevant to his credibility if he had been called as a witness;

(b) evidence which, if he had been cross-examined as to credibility, would have been inadmissible as being in contradiction of his answers; and

(c) evidence (to show only that he has contradicted himself) which proves that he has made, before or after making the statement or supplying the information and whether orally or not, a statement which is inconsistent with it.

(Draft Bill, clause 1(4), (5)[145])

2.47 **Additional evidence.** Under the provisions of the 1975 Act, as amended, the presiding judge at the trial may allow any party to lead additional evidence upon certain conditions. First, the judge must consider that the additional evidence is *prima facie* material. Secondly, he must accept that at the time the jury was sworn or, in a summary trial, at the time the party's evidence was closed,[146] either (a) the additional evidence was not available and could not reasonably have been made available, or (b) the materiality of such additional evidence could not reasonably have been foreseen by the party.[147] Where a statement in a business document has been adduced by one party and the other party has impugned the credibility of the supplier of the information by evidence led under clause 1(5), the provision recommended in the previous paragraph, the party tendering the statement may wish to lead additional evidence such as direct evidence of the matter about which the information was supplied or evidence in rebuttal of the attack on the supplier's credibility. There may be some doubt as to whether additional evidence for the latter purpose would satisfy the condition that the additional evidence should be *prima facie* material, because the credibility of the supplier might be regarded as a collateral matter.[148] We consider that for the avoidance of doubt it should be made clear that additional evidence may be led where evidence has been admitted under clause 1(5). Under further provisions of the 1975 Act the judge may permit the prosecution to lead additional evidence in replication.[149] Here no

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[145] There are provisions to the same effect in the Prisoners and Criminal Proceedings (Scotland) Bill, Sched 3, para 2(3), (4).

[146] In our draft cl 5 we have taken the opportunity to correct an apparent error in s 350(1) of the 1975 Act which by requiring the motion to be made "after the close of that party's evidence" deprives the party of his right under s 4 of the Evidence (Scotland) Act 1852 to move for recall of a witness before his case is closed. A similar error in s 149(1) was corrected by the 1987 amendment noted in the next footnote.

[147] 1975 Act, s 149(1) (substituted by the Criminal Justice (Scotland) Act 1980, c 62, s 30(1) and amended by the Criminal Justice (Scotland) Act 1987, c 41, s 70(1) and Sched 1, para 9) and s 350(1) (substituted by the 1980 Act, s 30(2)).

[148] Cf *Brown v Smith* 1981 SCCR 206, 1982 SLT 301.

[149] 1975 Act, ss 149A, 350A, both inserted by the Criminal Justice (Scotland) Act 1980, s 30(1), (2), and amended by the Law Reform (Miscellanous Provisions) (Scotland) Act 1985, c 73, s 37.

similar doubt arises because there is no statutory condition as to the materiality of the evidence in replication.[150] We **recommend:**

> **12. Where a party has led evidence under the previous recommendation, the other party should be entitled to lead additional evidence in terms of section 149 or section 350 of the Criminal Procedure (Scotland) Act 1975 (as substituted and amended).**

(Draft Bill, clause 5[151])

2.48 **Weight of statement.** Some modern statutes which provide for the admissibility of statements in documents try to help the court to estimate the weight to be attached to the statements. Section 1(3) of the Criminal Evidence Act 1965, repeating in part section 2(1) of the (English) Evidence Act 1938, provides:

> "In estimating the weight, if any, to be attached to a statement admissible as evidence by virtue of this section 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 person who supplied the information recorded in the statement did so contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not that person, or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts."

There are similar provisions in section 6(3) of the Civil Evidence Act 1968 and in paragraph 7 of Schedule 3 to the Police and Criminal Evidence Act 1984 (now repealed) which likewise mention particularly the factors of contemporaneity and of incentive to conceal or misrepresent the facts. On the other hand paragraph 3 of Schedule 2 to the Criminal Justice Act 1988 provides that in estimating the weight, if any, to be attached to a statement given in evidence by virtue of Part II (which is concerned with documentary evidence in criminal proceedings) "regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise".

2.49 Such provisions appear to us to be concerned to enact matters of common sense or logic. We are inclined to agree with the observation in Phipson on *Evidence* that "one would hardly have thought that such matters needed enacting,"[152] and we do not think that judges would require such assistance in directing themselves, or in directing juries, as to the cogency of any statement in a business document which would be admissible under our recommendations. As with any other item of evidence, parties would be entitled in their closing speeches to make submissions as to the weight to be attached to the statement, and its weight will be a matter for the jury, or the judge in a summary trial, to assess in the light of the relevant circumstances and the parties' submission. We **recommend:**

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[150] The Prisoners and Criminal Proceedings (Scotland) Bill takes a slightly different approach. Where evidence has been admitted under the corresponding provision as to the supplier, the judge may permit either party to lead additional evidence of such description as the judge may specify without prejudice to ss 149 or 350 (additional evidence) and ss 149A and 350A (evidence in replication) of the 1975 Act: Bill, Sched 3, para 5.

[151] The Prisoners and Criminal Proceedings (Scotland) Bill, Sched 3, para 5, contains a provision to the same effect.

[152] Phipson on *Evidence* (14th ed 1990) para 22-20.

13. No provision should be made as to the assessment of the weight to be attached to a statement admissible under the "statements in business documents" exception.[153]

Computer-generated statements

2.50 In the Discussion Paper we proposed that no special rules should be introduced to govern the admissibility of statements contained in documents produced by computers.[154] All those who commented on that proposition supported it. In the following paragraphs we shall explain how the provisions which we recommend would apply to business documents produced by a computer, and why no further provisions are necessary.

2.51 It is clear that any statutory exception to the hearsay rule in favour of statements in business documents must take account of statements produced by computers since computers are increasingly used by businesses of all kinds to generate and store information.

> "The law of evidence must be adapted to the realities of contemporary business practice. Mainframe computers, minicomputers and microcomputers play a pervasive role in our society. Often the only record of a transaction, which nobody can be expected to remember, will be in the memory of a computer. The versatility, power and frequency of use of computers will increase. If computer output cannot relatively readily be used as evidence in criminal cases, much crime (and notably offences involving dishonesty) will in practice be immune from prosecution."[155]

It is important to notice, however, that not all computer output is hearsay. "Hearsay invariably relates to information which has passed through a human mind."[156] Statements in business documents generated by a computer may be said to fall into two categories. First, there are statements which are not derived directly or indirectly from a human mind. Such a statement will not be excluded by the rule against hearsay, and may be regarded as real[157] or primary evidence. Secondly, there are statements which are derived directly or indirectly from a human mind. Such a statement will be excluded as hearsay unless it can be brought within an exception to the hearsay rule such as the "statements in business documents" exception.[158]

2.52 There are several reported examples of statements in the first category. Such statements may be classified with information produced by some purely mechanical functioning of a machine, such as a film or photograph automatically produced by a camera,[159] or a tape recording produced by a tape recorder.[160] The only other evidence which

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[153] There is no such provision in Sched 3 *supra*.

[154] DP, para 5.30, prop 15. There are no special provisions in the Civil Evidence (Scotland) Act 1988 as to the hearsay element in computer print-outs in civil cases.

[155] *R v Minors, R v Harper* (1989) 89 Crim App R 102 at p 103.

[156] J C Smith "The Admissibility of Statements by Computer" [1981] Crim L R 387 at p 391.

[157] The use of the term "real evidence" in this context has been criticised on the ground that it is apt to describe a document tendered to prove that the statement was made, not that the statement was true: J C Smith, commentary to *R v Spiby* [1991] Crim L R 199 at pp 201-202.

[158] A single document produced by a computer could contain real evidence; a statement made by a person; and information derived from such a statement such as information generated by the operation of a program in response to entries made by a person: see the commentary on *R v Shepherd* (1991) 93 Crim App R 139 in (Archbold, *Criminal Pleading, Evidence and Practice* (1992) (hereafter "Archbold") 4th Cumulative Supplement para 9-143.

[159] The *Statue of Liberty* [1968] 1 WLR 739; [1968] 2 All ER 195.

[160] *Hopes and Lavery v HMA* 1960 JC 104, 1960 SLT 264; *R v Maqsud Ali* [1966] 1 QB 688.

is necessary before the film, photograph or tape can be considered by the court is that of a witness such as the cameraman or operator who can explain its identify, its nature, its provenance and its relevance.[161] Thus, in *R v Wood*[162] the output of a computer which had been used only as a calculator was held to be admissible as real evidence: it was just as admissible, and with as little reference to the hearsay rule, as any evidence given by a witness of the results of an exercise involving the use of some equipment, device or machine. Similarly, in *Castle v Cross*[163] the print-out of a breath-testing machine was held to be "the product of a mechanical device which falls into the ... category of real evidence". Again, in *R v Spiby*[164] print-outs from a computer installed in a hotel which recorded, by mechanical means and without the intervention of a human mind, information about telephone calls made by guests in the hotel, were held to be admissible as real evidence. It has also been said that where a computer operator, by hitting the appropriate keys, credits an account, the print-out proves the thing done because it was the thing done or, at least, a copy of the thing done, and no hearsay is involved.[165] We consider that the distinction drawn in these cases between computer statements which are real evidence and others which contain an element of hearsay is sound and is likely to be recognised by the Scottish courts.[166]

2.53 Our recommendations are intended to include statements in the second category, that is, statements in business documents produced by computers which are derived directly or indirectly from a human mind. We recommend that such statements should be admissible if the human mind had personal knowledge of the information from which the statement was derived. Such statements include a statement produced by a computer which merely reproduces information supplied to the computer by a person or persons who had personal knowledge of the matters dealt with in the statement. They also include a statement which is the result of a calculation or other process performed by the computer upon the information supplied to it by such a person or persons.[167]

2.54 We add a few observations on the proof, in the absence of formal admission, of statements produced by computers. We have already noted the need for a witness to explain the identity, nature, provenance and relevance of a statement tendered as real evidence.[168] When the statement is tendered as falling within the "statements in business documents" exception, such a witness will again be necessary, but in addition the statutory conditions of admissibility[169] must be proved, either by that witness or by another witness or witnesses. The contents of the statement may be proved by a print-out, by a copy authenticated in accordance with a recommendation which we make in Part III[170] or, where

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[161] *Encyclopaedia of Information Technology Law* (1990), Chap 11, "Evidence" by C Tapper, para 11.06.
[162] (1983) 76 Crim App R 23, discussed in DP, paras 5.15-5.19.
[163] [1984] 1 WLR 1372, [1985] 1 All ER 87 *per* Stephen Brown L J at pp 1378-1379, 91; followed, *Garner v DPP* (1990) 90 Crim App R 178, [1989] Crim L R 583.
[164] (1990) 91 Crim App R 186.
[165] *R v Minors, R v Harper, supra* at p 107, approving a statement in Professor J C Smith's commentary on *R v Ewing* [1983] QB 1039 in [1983] Crim L R 472 at p 473. See also Professor Smith's commentary on *R v Minors, R v Harper* in [1989] Crim L R 360 at p 362.
[166] Three further English reported cases are noted for the sake of completeness. *R v Pettigrew* (1980) 71 Crim App R 39 is thought to have been wrongly decided (see C Tapper, *supra*, para 11.09; J C Smith "The Admissibility of Statements by Computer" [1981] Crim L R 387; J A Andrews and M Hirst, *Criminal Evidence* (1987) para 17.35; Phipson on *Evidence* (14th ed, 1990) para 21-19). *Sophocleous v Ringer* [1988] RTR 52 is criticised by D J Birch, [1987] Crim L R 422, J C Smith, [1991] Crim L R 199 at p 201 and A Keane, *The Modern Law of Evidence* (2nd ed, 1989), p 264, *R v Burke* [1990] Crim L R 401 is also thought to have been wrongly decided.
[167] See para 2.26 above.
[168] See para 2.52 above.
[169] See paras 2.36, 2.37 above.
[170] See para 3.16 below.

there is no print-out, by oral testimony from a witness or witnesses who saw the statement displayed on a visual display unit.[171] The decision as to whom to call as witnesses will be a matter for consideration according to the circumstances of each case:

> "Virtually every device will involve the person who made it, the persons who calibrated, programmed or set it up (for example with a clock the person who set it to the right time in the first place) and the person who uses or observes the device. In any particular case how many of these people it is appropriate to call must depend upon the facts of, and the issues raised and concessions made in that case."[172]

2.55 We do not consider it necessary to add any further conditions which must be satisfied before a statement produced by a computer may be admissible as evidence. Such conditions are prescribed by section 69 of the Police and Criminal Evidence Act 1984, which provides that no such statement shall be admissible as evidence of any fact stated therein unless it is shown:

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

The conditions referred to in sub-paragraph (c) are concerned with compliance with rules of court as to the pre-trial disclosure of information about the statement. The Act also makes provision for proof by certificate of these and other matters.[173] The justification for such elaborate provisions would appear to be that[174]

> "… computers are not infallible. They do occasionally malfunction. Software systems often have 'bugs'. Unauthorised alteration of information stored on a computer is possible. The phenomenon of a 'virus' attacking computer systems is also well established. Realistically, therefore, computers must be regarded as imperfect devices."

2.56 We accept that computers are not infallible, but we consider that the primary consideration in framing the scope of conditions of admissibility for computer-generated statements in business documents must be that in practice such statements are accepted as reliable in daily practice by the business community. We would adopt the principle stated in Cross on *Evidence* which has been applied to computers more than once by courts of high authority in England, that if a mechanical instrument is of a kind as to which it is common knowledge that they are more often than not in working order, in the absence of evidence to

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[171] *Smith v Macdonald*, *Smith v Davie* 1984 SCCR 190, 1984 SLT 398; *Gunn v Brown* 1986 SCCR 179; *Denneny v Harding* [1986] RTR 350. It is not hearsay for a witness to tell the court what a computer, which he has used to perform a calculation, "told" him was the result: *R v Wood* (1983) 76 Crim App R 23.

[172] *R v Wood*, *supra* at p 27.

[173] PACE, s 70(2), Sched 3, para 8.

[174] *R v Minors*, *R v Harper* (1989) 89 Crim App R 102 at pp 103-104.

the contrary the court will presume that it was in working order at the material time.[175] It may not be necessary to produce a witness who was familiar with the operation of the computer at the material time to say that it was in working order: it has been observed that where a lengthy computer print-out contains no internal evidence of malfunction and is retained, for example by a bank or a stockbroker, as part of their records, it may be legitimate to infer that the computer which made the document was functioning correctly.[176] It would be open to the party against whom the statement was adduced to lead evidence which shows that the computer was not working properly or was not being operated properly[177] or which raises a doubt in that respect. The following comment on the requirements of section 69 of the Police and Criminal Evidence Act 1984, which is concerned with computer evidence, is also pertinent:[178]

> "The only comment we would make is that the failure of a computer, or a software programme, may occasionally result in a total failure to supply the required information, or in the supply of unintelligible or obviously wrong information. It will be a comparatively rare case where the computer supplies wrong and intelligible information, which pertinently answers the questions posed. Nevertheless, such cases could occur. In the light of these considerations trial judges, who are called upon to decide whether the foundation requirements of section 69 have been fulfilled ought perhaps to examine critically a suggestion that any prior malfunction of the computer, or software, has any relevance to the reliability of the *particular* computer record tendered in evidence."

2.57 In the light of these considerations we have concluded that there is no sound basis for distinguishing, for the purpose of imposing safeguards of reliability, between statements in business documents containing an element of hearsay which are produced by a computer and those which are not. We also consider that it is unnecessary to enact any guidelines as to the weight to be attached to a statement produced by a computer. Paragraph 11 of Schedule 3 to the Police and Criminal Evidence Act 1984, which is concerned with computer evidence, contains such guidelines, virtually identical to those in paragraph 7 which we discussed in paragraphs 2.48 and 2.49 above. For the reasons given there, we have decided not to recommend the enactment of such provisions. We therefore **recommend:**

> **14. No special provision should be made as to the admissibility of statements in business documents produced by computers.**[179]

Statements not contained in business documents

2.58 We proposed that the opportunity should be taken to resolve the following question. Where a fact, if true, or an event, if it occurred, would have been the subject of a statement in a business document which would have fulfilled the admissibility conditions,[180] and there is no such statement, should evidence of the absence of any statement be admissible for the purpose of proving that the fact is untrue or the event did not occur? It is arguable that the

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[175] Cross (5th ed, 1979), p 47 (and see 7th ed, 1990, pp 30-31), applied in *Castle v Cross* [1984] 1 WLR 1372, [1985] 1 All ER 87, *R v Spiby* (1990) 91 Crim App R 186.
[176] *R v Governor of Pentonville Prison, ex p Osman* (1990) 90 Crim App R 281 at p 307; *R v Shephard* (1991) 93 Crim App R 139 at p 143.
[177] Eg evidence from which it is reasonable to infer malfunction: *Cracknell v Willis* [1988] AC 450 *per* Lord Griffiths at p 468.
[178] *R v Minors, R v Harper, supra* at p 108.
[179] There is no such provision in the Prisoners and Criminal Proceedings (Scotland) Bill, Sched 3.
[180] See paras 2.21-2.26, 2.36, 2.37 above.

evidence should be inadmissible on the ground that it is hearsay or, as it is sometimes called, "negative hearsay".

> "If it were sought to establish that A was not employed by B, the production of a list of B's employees, not containing A's name, would infringe the hearsay rule just as much as that rule would be infringed by the production of such a list contained in A's name as evidence that A was employed by B."[181]

> "An inference from the absence of an entry presupposes that the entries that have been made are complete, ie that the record does not lie when it is silent."[182]

There appears to be no Scottish authority on the question. In *Edwards v HM Advocate*,[183] where evidence was tendered that a witness had searched the records of a hospital in order to see whether a named doctor had been employed there, the objection which was taken (and repelled) was that the records had not been produced, not that the witness's evidence was hearsay. In England and Wales it is not entirely clear whether, or in what circumstances, such evidence may be admissible,[184] and it has been regretted that in the Criminal Justice Act 1988 the opportunity was not taken to make explicit provision in relation to negative hearsay.[185]

2.59 It appears to us that in many cases evidence of the absence from a business document of a statement based on personal knowledge may be as cogent, and as relevant to the issue of the truth of the matter in question, as evidence of the presence of such a statement. Once it is accepted that such statements should be admissible on the ground that they may be presumed to be generally reliable and may be the best available evidence, the absence of such a statement should also be admissible.[186] We referred to this matter in our *Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* and recommended that evidence should be admissible as to the absence of a statement in the records of a business or undertaking.[187] That recommendation was implemented by section 7(1) of the Civil Evidence (Scotland) Act 1988. In the Discussion Paper we proposed that similar provision should be made for criminal proceedings.[188] That proposition was generally accepted, but certain consultees suggested that it should be extended to the absence of statements from certain public registers and records. That suggestion has been implemented in Schedule 4 to the Prisoners and Criminal Proceedings (Scotland) Bill which adds to the matters that may be proved by certificate in terms of section 26 of and Schedule 1 to the Criminal Justice (Scotland) Act 1980 the fact that a person did not hold various specified statutory certificates, authorities or licences. Our proposition in the Discussion Paper is similar to the provision in the Federal Rules of Evidence that evidence is admissible of the absence of an entry in records "kept in the course of a regularly conducted business activity"

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[181] Cross (5th ed, 1979), p 466.
[182] A A S Zuckerman, *The Principles of Criminal Evidence* (1989), p 193.
[183] 2 May 1991, Crown Office Circular A23/91, reported only in 1991 GWD 24-1360.
[184] See *R v Patel* (1981) 73 Crim App R 117; *R v Shone* (1983) 76 Crim App R 72; *R v Muir* (1984) 79 Crim App R 153; commented on in all the standard English textbooks on evidence and in A Ashworth and R Pattenden "Reliability, Hearsay Evidence and the English Criminal Trial" (1986) 102 LQR 292 at pp 308-311.
[185] Cross (7th ed, 1990), pp 521, 632; Di Birch "The Criminal Justice Act 1988: (2) Documentary Evidence" [1989] Crim L R 15 at p 31.
[186] The argument that the negative cannot be within anyone's personal knowledge was rejected in *R v Shone, supra*, at pp 75-76.
[187] (1986) Scot Law Com No 100, paras 3.72, 3.73, rec 27.
[188] DP, paras 6.10-6.14, prop 19.

as an exception to the rule against hearsay.[189] We consider in Part III how the absence of the statement may be proved.[190] We **recommend:**

> **15. Evidence should be admissible as to the absence of a statement from a business document.**

(Draft Bill, clause 3[191])

Judicial discretion

2.60 In the Discussion Paper we considered the topic of judicial discretion to exclude hearsay evidence which would otherwise be admissible.[192] Proposition 4 sought views on two alternative propositions: (a) that it should be expressly declared by statute that, where hearsay evidence would otherwise be admissible in criminal proceedings, there should be no judicial discretion to exclude it on any ground; and, alternatively, (b) that it should be expressly declared by statute that, where hearsay evidence would otherwise be admissible in criminal proceedings, the judge should nonetheless have a discretion to exclude that evidence if its terms, or the circumstances in which the statement was made, give rise to a reasonable suspicion either that the statement was not in accordance with the truth, or was a distorted, one-sided version of the truth.[193] Later in the Discussion Paper we proposed in proposition 9 two similar alternative propositions in relation to business documents: (a) that the judge should have a discretion to exclude on those grounds a statement in a document which would otherwise be admissible in terms of a business documents exception to the hearsay rule; and (b) that, where such a statement would otherwise be admissible as in (a) there should be no judicial discretion to exclude it.[194]

2.61 Our consultation disclosed clear differences of opinion on these matters. Indeed differing views were expressed as to whether the Scottish courts already have a general discretion to exclude evidence which would otherwise be admissible. It appears to us that the only situation in which a Scottish judge in a criminal trial clearly has a discretion to exclude such evidence arises where he is required to decide whether to grant or refuse leave to cross-examine the accused in terms of section 141(1) proviso (f) or section 346(1) proviso (f) of the Criminal Procedure (Scotland) Act 1975.[195] It has also been said that the judge has a discretion to excuse a witness upon a ground of conscience from answering a relevant question which the judge considers to be unnecessary or not useful.[196] However that may be, the question for us in this Report is whether an exclusionary judicial discretion should be conferred or excluded by statute.

2.62 We have reached the view that there should not be any statutory provision conferring on the court a discretion to exclude evidence which would be admissible in terms

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[189] R 803(7). See also r 803(10) (absence of public record or entry).
[190] See paras 3.7, 3.8 below.
[191] There is a provision to the same effect in the Prisoners and Criminal Proceedings (Scotland) Bill, Sched 3, para 4.
[192] DP, paras 3.28-3.44, 3.67-3.68.
[193] DP, para 3.44.
[194] DP, para 3.68.
[195] If a decision to admit evidence by excusing an illegality or irregularity whereby it has been obtained is to be regarded as the exercise of a discretion, it is an inclusionary discretion to admit evidence otherwise inadmissible which operates against the accused. The text above discusses the existence of a discretion to exclude evidence which is legally admissible, and operates in favour of the accused.
[196] *HMA v Airs* 1975 JC 64 at p 70, 1975 SLT 177 at p 180.

of our recommendations. Thus our recommendations have no bearing on the question whether the court may exercise such a discretion at common law. We have refrained from recommending a statutory exclusionary discretion not only because we believe that in general there is no such discretion at common law but also because we consider that the introduction of such a discretion would be likely to lead to inconsistent decisions by trial judges in similar circumstances, and the High Court sitting as a Court of Criminal Appeal might be properly reluctant to interfere with the exercise of a judge's discretion. There would therefore be a serious risk of uncertainty in this branch of the law: it would be difficult to predict how the discretion would be exercised and thus to prepare for trial, and it would be difficult for defence lawyers to advise their clients. We consider that it would be undesirable to introduce any statutory provision which would lead to uncertainty in the administration of criminal justice.

2.63 Those who favour the introduction of a statutory discretion may point to the provisions of the Criminal Justice Act 1988 whereby the court in England and Wales is given extensive powers to control the admissibility and use of statements in documents which are admissible under the Act. While we are indebted to the Criminal Justice Act for several ideas which we have gratefully adopted or adapted in this Report, we do not follow it in this respect for the following reasons. First, for many years the English judge in a criminal trial has enjoyed a general common law discretion to exclude evidence if in his opinion its prejudicial effect outweighs its probative value.[197] Accordingly, English judges and practitioners, unlike their counterparts in Scotland, are accustomed to the exercise of an exclusionary discretion. Secondly, before he goes into court an English judge, unlike a Scottish judge, is provided with (i) the witnesses' depositions; (ii) any additional evidence served by the prosecution after the committal proceedings; (iii) any documentary exhibits referred to therein, including, for example, photographs of the complainant and the locus *in quo*; (iv) any notice of alibi served by the defendant under section 11 of the Criminal Justice Act 1967; and (v) the accused's record and antecedents.[198] He is therefore able to assess the probative value of the evidence and its effect on the fairness of the proceedings with the assistance of his pre-trial consideration of these documents. A Scottish judge, on the other hand, is given before the trial only a copy of the indictment, which includes lists of the Crown witnesses and productions, and a copy of any special defence. On occasions, copies of the documentary productions are made available to him before the trial. To give him any further information such as is provided to an English judge would be a major departure from Scottish practice which we could not recommend in the context of this Report. Thirdly, the provisions of the Criminal Justice Act 1988 which confer the exclusionary discretion are very elaborate. Section 25(1) provides that if the court is of the opinion that in the interests of justice a statements which is admissible by virtue of section 23 or 24 (which are concerned with statements in documents) nevertheless ought not to be admitted, it may direct that the statement shall not be admitted. Section 25(2) provides that without prejudice to the generality of subsection (1), it shall be the duty of the court to have regard to a number of matters which are specified in four paragraphs. We consider that if a new discretion were to be conferred on the Scottish courts, it would be necessary to contemplate the enactment of a

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[197] *R v Sang* [1980] AC 402. See Phipson on *Evidence* (14th ed, 1990) paras 28-01 to 28-09; R Pattenden, *Judicial Discretion and Criminal Litigation* (1990) Chap 7.

[198] There appear to be few published references to this aspect of English criminal practice. See Glanville Williams, *The Proof of Guilt* (3rd ed. 1963) pp 33-35; *R v Turner* (1970) 54 Cr App R 352 *per* Lord Parker of Waddington LCJ at p 361: *R v Ryan* (1978) 67 Cr App R 177 *per* Waller LJ at p 180; *Archbold*, vol 1 (1992), paras 4-76, 4-77 (Farquharson Committee Report).

similar list of matters for the guidance of the exercise of the discretion. We would not be inclined to recommend a provision on such lines unless there were convinving reasons for the introduction of the new discretion.

2.64 We consider that the case for the introduction of a statutory discretion and the elaborate provisions which would be required is not established. There appears to us to be room for the exercise of an exclusionary discretion only in relation to the production of a document as forming part of the documents kept by a business[199] or as a copy of a document,[200] or in relation to evidence that a particular statement is not contained in the documents kept by a business.[201] We discuss these matters in Part III of this Report.

2.65 We therefore **recommend:**

> **16. There should be no statutory discretion to exclude evidence rendered admissible in terms of the recommendations in this Part of this Report.**[202]

[199] See paras 3.2, 3.3 below.
[200] See paras 3.17-3.19 below.
[201] See paras 3.7, 3.8 below.
[202] No such discretion is conferred by the Prisoners and Criminal Proceedings (Scotland) Bill, Sched 3.

Part III Proof of documents and miscellaneous matters

Introduction

3.1 In Part II of this Report we considered the admissibility of hearsay statements in business documents as evidence of the matters contained in them, and the admissibility of evidence of the absence of such a statement from a business document, as exceptions to the rule against hearsay. In this Part we discuss how such statements, or the absence of such statements, may be proved, and we make recommendations as to proof by certificate.[1] We also recommend that an authenticated copy of any document (not only a business document) should be generally deemed a true copy and treated for evidential purposes as if it were the original. We then examine provisions of the Bankers' Books Evidence Act 1879 which are concerned both with the creation of an exception to the hearsay rule and with how entries in bankers' books may be proved. We notice sections 30 and 31 of the Criminal Justice Act 1988. Finally, we make proposals for a transitional provision in the legislation implementing the recommendations in Parts II and III of this Report.

Proof of business documents

3.2 We discussed in Part II three conditions on which a hearsay statement in a business document should be admissible: that it should have been based on personal knowledge, made for business purposes and contained in a document kept by a business. In the absence of formal admission,[2] the first two conditions would require to be proved by evidence appropriate to the circumstances of the case. The third condition, however, is such that in the absence of formal admission it could be established by a standard mode of proof which would render unnecessary the leading of oral evidence in court from a witness in order to prove it. In the Discussion Paper we proposed that such evidence should be unnecessary provided that the document was suitably authenticated and provided also that the court should have a discretionary power to direct in any particular case that proof by such authentication should not be permitted. We proposed that the authentication should be in the form of a docquet certifying that the document was a document of the business and purporting to be signed by an officer of the business.[3] This proposition echoed a recommendation in our *Report on Corroboration, Hearsay and Related Matters in Civil Proceedings*[4] which was implemented by section 5 of the Civil Evidence (Scotland) Act 1988. The proposition was accepted by most of those who commented on it, but some reservations were expressed as to whether the expression "by an officer" would ensure that the signatory was a person of appropriate standing in the business.

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[1] We have already made some observations about the proof of statements in business documents produced by computers: see para 2.54 above.

[2] By "formal admission" we mean admission by minute (see para 4.4) or by the new procedure recommended in Part IV.

[3] DP, paras 6.5, 6.6, prop 17.

[4] (1986) Scot Law Com No 100, para 3.70, rec 25.

3.3 We have decided to recommend that unless the court otherwise directs, the document should be taken to be a document kept by a business if it is certified as such by a docquet purporting to be signed by a person authorised to sign on behalf of the business to which the document relates. We have substituted "by a person authorised to sign on behalf of the business" for "by an officer of the business" because it does not seem possible to specify the appropriate standing of signatories in the wide range of businesses, undertakings and offices to which our recommendations apply. If the standing of the authorised signatory is not disclosed in the docquet or does not seem appropriate to the duty of certifying the document, the party tendering the document will take the risk that the court may direct that the document is not to be admitted in the exercise of the discretionary power to which we have referred. The qualification "unless the court otherwise directs" has the effect of conferring that discretion on the court. We would not expect the court to exercise the discretion unless the party objecting to the statutory mode of authentication put forward at least *prima facie* grounds for not accepting that the document had been kept by the business concerned. In solemn procedure this is a matter which it might be appropriate to raise at a preliminary diet,[5] thus eliminating any need to adjourn a jury trial which is in progress. In both solemn and summary procedure, however, we propose that where the judge has directed that the statutory mode of authentication is not permissible, he may permit additional evidence to be led in order to prove that the document is kept by a business.

3.4 The phrase "purporting to be signed" is intended to allow the document to be deemed to form part of the documents kept by the business if the docquet bears on its face what appears to be the signature of an authorised person.[6] The phrase is also intended to permit the use of a facsimile signature. In section 5(2) of the Civil Evidence (Scotland) Act 1988 there is an express provision that for the purposes of that section a facsimile signature is to be treated as a signature. We consider that in legislation for evidence in criminal proceedings such a provision is unnecessary in view of the decision in *Cardle v Wilkinson*[7] where a document bearing a rubber stamp facsimile signature of the name of a person stated to be authorised to authenticate such a document was held to be "a document purporting to be … authenticated by a person authorised in that behalf". While high evidential standards are necessary in criminal proceedings where matters are contested, there seems to be no reason why a facsimile signature should not be used if the party against whom the statement in the document is adduced has no substantial objection. On the other hand, the party tendering the statement would be well advised not to rely on a facsimile signature if there is any prospect of substantial objection, since the court in that event might exercise its discretion to make a direction.

3.5 We omit from our recommendation the last clause of the proposition in the Discussion Paper, which was that a statement in a document certified in the matter proposed should be "received in evidence without being spoken to by a witness". There is a provision to that effect in section 5(1) of the Civil Evidence (Scotland) Act 1988. That Act, however, did not prescribe any particular conditions which had to be satisfied before

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[5] 1975 Act, s 76, substituted by the Criminal Justice (Scotland) Act 1980, Sched 4, and proposed to be amended by cl 38 of the Prisoners and Criminal Proceedings (Scotland) Bill: see para 4.19 below.
[6] In *Donlon v MacKinnon* 1981 SCCR 219, 1982 SLT 93, a written execution of service which bore on its face what appeared to be the signature of the person who had served it was held to be "a written execution purporting to be signed by the person who served" the document in terms of the relevant legislation.
[7] 1982 JC 36, 1982 SCCR 33, 1982 SLT 315.

hearsay statements in business documents could be admissible as evidence of matters contained in them. Under our recommendations, on the other hand, there are, as we have mentioned, three conditions which must be satisfied. Accordingly, a statement in a document authenticated as we propose could not be received in evidence without being spoken to by a witness unless it was admitted or proved that it met the requirements of having been made for business purposes and on the basis of personal knowledge.

3.6 We **recommend:**

17. (1) Unless the court otherwise directs, a business document should be taken to form part of the documents kept by the business concerned if it is certified as such by a docquet purporting to be signed by a person authorised to sign on behalf of the business.

(2) Where the court has made a direction under paragraph (1) above, it should be entitled to permit additional evidence to be led in terms of section 149 or section 350 of the Criminal Procedure (Scotland) Act 1975 (as substituted and amended).

(Draft Bill, clauses 2, 5[8])

Proof that statement is not contained in business document

3.7 In Part II we recommended that evidence should be admissible as to the absence of a statement from a business document.[9] We now consider how its absence should be proved. We propose that, first, it may be proved by the evidence of a person authorised to give evidence on behalf of the business and, as in civil proceedings,[10] it should not be necessary for him to produce any part of the documents kept by the business and refer to them in the witness box. Secondly, we propose that the authorised person's evidence may be given by means of a certificate, unless the court otherwise directs in the exercise of a discretion similar to that discussed above in relation to the proof of business documents; and where the court so directs, it may allow additional evidence to be led.[11] The corresponding provision for such evidence in civil proceedings, section 7(2) of the Civil Evidence (Scotland) Act 1988, allows the evidence to be given by affidavit, but affidavits cannot be generally used in Scottish criminal proceedings.[12] We therefore propose instead a certificate, in a form prescribed by act of adjournal, signed by the authorised person. If in the certificate that person were to make knowingly and wilfully a statement false in a material particular, he would commit an offence under section 2 of the False Oaths (Scotland) Act 1933 if he made the statement in Scotland, or under section 5 of the Perjury Act 1911 if he made it in England.

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[8] There are similar provisions in the Prisoners and Criminal Proceedings (Scotland) Bill, Sched 3, paras 3, 5. Para 3 provides that the form of the docquet and the manner of its authentication should be prescribed by act of adjournal (see para 7, sv "prescribed").
[9] See paras 2.58, 2.59 above.
[10] Civil Evidence (Scotland) Act 1988, s 7(1).
[11] See para 3.3 above.
[12] Solicitors (Scotland) Act 1980, c 46, s 59(2); Commissioners for Oaths Act 1889, 52 & 53 Vict c 10, s 1(2).

3.8 We **recommend**

18. (1) The fact that a particular statement is not contained in a business document should be capable of proof by the oral evidence of an authorised person or, unless the court otherwise directs, by means of a certificate (in a form prescribed by act of adjournal) signed by such a person, without the production of any of the documents kept by the business.

(2) Where the court has made a direction under paragraph (1) above, it should be entitled to permit additional evidence to be led in terms of section 149 or section 350 of the Criminal Procedure (Scotland) Act 1975 (as substituted and amended).

(Draft Bill, clauses 3, 5[13])

Copies of documents

The present law

3.9 In the following paragraphs we discuss the reform of the law as to the admissibility of copies of documents in criminal proceedings. The discussion covers not only copies of business documents, but copies of documents of all kinds.[14] In criminal proceedings the admissibility of copies is generally regulated by the common law, which provides that a copy of a document which is in existence is generally inadmissible: it is normally admissible only when the document itself is unavailable - for example, where a person beyond the jurisdiction of the court refuses to give it up.[15] These rules, which predate the invention of modern automatic methods of copying, were justified on the grounds "that copies are often inaccurate from inadvertence, that admitting them would afford opportunities for misleading the jury, and that a party is most likely to tender such secondary evidence in order to gain an improper advantage from a discrepancy between it and the original document".[16] The first of these grounds, the risk of inadvertent error, is inapplicable as regards the text of a document where the copy is a photocopy. As to the others, any risk that the jury might be misled or an improper advantage gained may be met by a power in the court to direct the production of the original where it is desirable that the court should see the original or where there is any genuine dispute as to its appearance. For such reasons this Commission recommended that in civil proceedings the common law and certain statutory provisions should be superseded by a new provision,[17] enacted as section 6 of the Civil Evidence (Scotland) Act 1988, whereby a copy of a document purporting to be authenticated by a person responsible for the making of the copy is, unless the court otherwise directs, to be deemed a true copy and treated for evidential purposes as if it were the document itself.

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[13] There are provisions to the same effect, differently worded, in the Prisoners and Criminal Proceedings (Scotland) Bill, Sched 3, paras 4, 5.
[14] See para 3.20 below.
[15] W G Dickson, *The Law of Evidence in Scotland* (3rd ed, 1887, ed P J Hamilton Grierson), paras 227-236.
[16] Dickson, *supra*, para 227.
[17] *Report on Corrobation, Hearsay and Related Matters in Civil Proceedings* (1986) Scot Law Com No 100, para 3.71, rec 26.

Our Discussion Paper and the responses

3.10 In the Discussion Paper we proposed that a similar provision should be enacted for criminal proceedings. We drew attention to the reliability of modern methods of copying and the inconvenience of producing original documents where copies could reasonably be used. We also noted that where information was contained in computer print-outs the concept of an original document might have little meaning. We further considered that copies should be admissible even if the original was no longer in existence: thus, for example, where microfilm copies had been made of bulky paper documents which had thereafter been destroyed, the microfilm copies would be admissible. Where an original document was in existence, however, the court should have a discretion to require it to be produced: that might be appropriate where, for example, it was alleged that the document was a forgery, or that some part of it had been altered or was in a different colour from the copy.[18]

3.11 The proposition in the Discussion Paper was generally well received, although some consultees desiderated that production of the original should be mandatory where it was the subject of a charge, and others expressed concern at the width of the discretion proposed to be conferred on the court. They questioned whether it might not lead to uncertainty, inconsistency and, where the court declined to permit the production of a copy, delay if the proceedings had to be adjourned in order to allow the original to be produced. We take account of these comments when explaining our recommendations in the following paragraphs.

Our recommendations

3.12 Our recommendations will be most conveniently explained by setting out and commenting on clause 4 of our draft Bill, which provides:

> "(1) for the purposes of any criminal proceedings, a copy of, or of the material part of, a document, authenticated in such manner as the court may approve, shall, unless the court otherwise directs, be-
>
> (a) deemed a true copy; and
>
> (b) treated for evidential purposes as if it were the document, or the material part of the document, itself.
>
> (2) It is immaterial for the purposes of this section-
>
> (a) whether or not the document itself is still in existence; and
>
> (b) how many removes there are between a copy and the original.
>
> (3) In this section 'copy' includes a transcript or reproduction."

3.13 **"Document"; "copy".** The scope of this clause is wide. It is not limited to copies of business documents but extends to copies of any materials which fall within the definition of "document" in clause 6(1).[19] It therefore permits not only photocopies of papers on which

[18] DP, paras 6.1-6.4, prop 16.
[19] See paras 2.18, 2.19 above.

words or figures have been written, typewritten or printed by conventional means, but also copies of, for example, video and tape recordings. Further, in clause 4(3) "copy" is given the same open-ended definition as in section 6(2) of the Civil Evidence (Scotland) Act 1988.[20] That definition appears to us to be wide enough to enable the court to admit copies in the variety of forms which current and future technological developments may make possible. It includes a transcript of the sounds or other data where the document is a disc, tape, sound track or other device in which such data (not being visual images) are recorded.[21] It also includes a reproduction of the visual image recorded in a document which is a film, negative, tape, disc or other device in which visual images are recorded.[22] There is no restriction on the enlargement of the reproduction. Thus, an enlargement of a microfilm copy of a document will be admissible. When both sound and visual images are recorded in the document, both a transcript and a reproduction will constitute a copy. Where for a sufficient reason a copy of the whole document is not produced, a copy of "the material part" of it may be admissible: for example, where the only available copy is a carbon copy of the words written or typed on an original printed document such as a letter with a printed letterhead or a form containing printed instructions or information.

3.14 **Copies of copies.** Whether a copy of a copy is admissible at common law is said not to have been decided in Scotland.[23] In any event, the risk of errors through successive transcriptions will not normally be present when the various types of "document" which fall within the definition of that expression are copied. Clause 4(2)(b) therefore provides that it does not matter how may removes there may be between the copy produced and the original.

3.15 **Original not in existence.** Clause 4(2)(a) allows a copy to be treated as if it were the original whether or not the original itself is still in existence. It accordingly modifies the common law rule that a copy is normally admissible only if the original is unavailable.[24] As we have already observed,[25] original paper documents may be destroyed after they have been microfilmed.

3.16 **Authentication.** Clause 4(1) also provides that the copy should be "authenticated in such manner as the court may approve".[26] Our proposition in the Discussion Paper[27] followed the wording of section 6(1) of the Civil Evidence (Scotland) Act 1988: "purporting to be authenticated by a person responsible for the making of the copy". This requirement could cause difficulty, however, where the copy had been made at some time in the past, the original was no longer available (because, for example, it had been destroyed after being microfilmed) and the person responsible for the making of the copy was also unavailable. We consider that it would be more satisfactory to give the court a wide discretion to decide how a copy is to be authenticated. In many cases it will be impracticable to require that the copy should have been compared with the original,[28] not only where the original no longer

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[20] The Civil Evidence Act 1968, s 10(2), contains a more elaborate, but not exhaustive, definition which is extended to Part II of the Criminal Justice Act 1988 by s 28(2) and Sched 2, para 5.
[21] Such a document falls within para (c) of the definition of "document" in cl 6(1).
[22] Such a document falls within para (d) of the definition.
[23] Dickson, *supra*, para 243. For the law in England and Wales see Phipson on *Evidence* (14th ed, 1990), para 36-22.
[24] See para 3.9 above. There are similar provisions in PACE, s 71, and in the Criminal Justice Act 1988, s 27, but not in the Civil Evidence (Scotland) Act 1988, s 6.
[25] See para 3.10 above.
[26] This is the formula in the Criminal Justice Act 1988, s 27.
[27] DP, para 6.4, prop 16.
[28] A requirement of the Bankers' Books Evidence Act 1879, 42 & 43 Vict c 11, s 5. See para 3.22 below.

exists, but also where a large number of documents have been mechanically copied at very high speed. Anyone who had examined the copy and the original, or who had been aware that the machine had been working properly when it made the copy, might not be available to give evidence, and might be unlikely to remember anything even if he or she could be found. We consider that in such cases the authenticity of the copy might be proved by a witness or witnesses who could explain its provenance and who had custody or control of the copy before it was lodged in court. We would expect that in the great majority of cases there would be no difficulty over the mode of authentication of copies because they would be formally admitted[29] to be equivalent to the originals, and that where difficulties were thought likely to arise in solemn procedure they could be resolved at a preliminary diet.[30]

3.17 **Direction by court.** Clause 4(1) provides that a copy which has been authenticated in a manner approved by the court is to be deemed a true copy and treated for evidential purposes as if it were the original "unless the court otherwise directs". We have noted the views of those consultees who were concerned that such a provision might lead to uncertainty, inconsistency and, where the court made a direction, delay if the proceedings were adjourned to allow the original to be produced.[31] We have therefore considered whether the clause should indicate the nature of the circumstances in which the court may "otherwise direct". We have decided against that course because we think that to do so would be to take what may be described as a "holding of the hand approach", in much the same way as provisions telling the court how to estimate the weight to be attached to a statement[32] have been regarded as examples of "excessive hand-holding".[33] It would be otiose to provide that a court should only make a direction where the interests of justice so require, because in the absence of specific guidance by a superior court or statutory provision that is the only ground on which a court will make a decision in the exercise of a discretion. It will be clear to the court that it should not exercise its discretion in such a way as to defeat the object of the legislation, which is that as a general rule duly authenticated copies of any document should be admitted, at any remove from the original and whether the original is still in existence or not, provided that the original would have been relevant and admissible. The fact that evidence is tendered in the form of a copy may have a bearing on its weight, but does not *per se* render it inadmissible.[34]

3.18 Where a party moves the court to make a direction,[35] the issue to be resolved will be whether the original should be required or not, and the court may be expected to make a direction where a genuine and important question is raised as to the authenticity of the original or the accuracy of the copy, or where there are other circumstances in which it would be unfair to admit the copy in place of the original.[36] In a trial for uttering or any other case where there is a genuine and important issue as to whether a document has been forged or tampered with, the original document will be so obviously material that it should be produced as a matter of course if it is practicable to do so, and the court may be expected to make a direction if it were not produced. Questions as to the accuracy of a mechanically

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[29] On formal admissions see footnote to para 3.2 above.
[30] On preliminary diets see footnote to para 3.3 above.
[31] See para 3.11 above. As before (see paras 3.3, 3.7 above), the court would be entitled to allow additional evidence to be led.
[32] See paras 2.48, 2.49 above.
[33] *Evidence* (1985) Law Reform Commission of Australia, Report No 26, vol i, para 323.
[34] *R v Wayte* (1983) 76 Crim App R 110 at pp 116-117.
[35] The court generally cannot exclude evidence *ex proprio motu*.
[36] Cf Federal Rules of Evidence, r 1003.

produced copy are unlikely to arise: people are unlikely to use machines that do not copy accurately, and the making of a false copy by, for example, tampering with microfilm is possible but difficult.[37] The question whether the copy accurately reproduces a particular feature of the original, such as a colour, may or may not be important. As to unfairness, the mere fact that the copy, if admitted, will be adverse to the party seeking to demonstrate unfairness is irrelevant since Parliament by enacting the legislation will have impliedly decided that there is nothing intrinsically unfair about the admission of a copy. It will not normally be unfair that there is no opportunity to cross-examine the operator of the copying machine or to examine the original of a tape or other device containing computer instructions or data which would be likely to be meaningless to the court. A copy made for business purposes, by whatever means it may have been produced, is as likely to be accurate and reliable as any other document made and kept for business purposes.[38] In considering the issue of fairness it would also be legitimate to consider whether the production of the original would involve undue expense or delay or would not be reasonably practicable. The considerations mentioned in this paragraph, which are not exhaustive, could be specified in legislation, but we have no doubt that they would be obvious to any experienced judge. We do not think, therefore, that there is a significant risk that different judges will make inconsistent decisions in similar circumstances.

3.19 There remain for discussion the risks of uncertainty and delay to which our consultees referred.[39] We considered whether these risks might be reduced by a pre trial notice procedure whereby a party intending to rely on a copy would be required to serve a notice on the other party who would be entitled to serve a counter-notice by way of objection. We concluded that the introduction of such a procedure might frustrate the purpose of the legislation by discouraging parties from tendering copies and encouraging their opponents to object when they did. We think that the risks of uncertainty and delay would be more effectively diminished by the use of a preliminary diet in solemn procedure[40] to resolve the question whether a direction should be made.

3.20 **Other statutory provisions.** Clause 4, like section 6 of the Civil Evidence (Scotland) Act 1988, applies to all kinds of documents. Section 27 of the Criminal Justice Act 1988 likewise deals with the proof of statements in copies of all kinds of documents. There are many statutory provisions whereby the contents of particular classes of documents, mainly public documents, may be proved in a particular way, for example by the production of an examined or certified copy or a certified extract. These specific provisions are not overridden by the general provisions of clause 4, section 6 or section 27.[41]

3.21 We **recommend:**

19. (1) For the purposes of any criminal proceedings, a copy of, or of the material part of, a document, authenticated in such manner as the court may approve, should, unless the court otherwise directs, be-

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[37] *Evidence, supra*, vol i, para 323.
[38] See para 2.21 above.
[39] See paras 3.11, 3.17 above.
[40] On preliminary diets see footnote to para 3.3 above.
[41] *Aberdeen Suburban Tramways Co v Magistrates of Aberdeen* 1927 SC 683, 1927 SLT 468; F Bennion, *Statutory Interpretation* (2nd ed, 1992), pp 205-207; *Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* (1986) Scot Law Com No 100, para 4.5, rec 32; Civil Evidence (Scotland) Act 1988, s 10(3).

(a) deemed a true copy; and

(b) treated for evidential purposes as if it were the document itself.

(2) It is immaterial for the purposes of this recommendation-

(a) whether or not the document itself is still in existence; and

(b) how many removes there are between a copy and the original.

(3) In this recommendation "copy" includes a transcript or reproduction.

(4) Where the court has made a direction under paragraph (1) above, it should be entitled to permit additional evidence to be led in terms of section 149 or section 350 of the Criminal Procedure (Scotland) Act 1975 (as substituted and amended).

(Draft Bill, clauses 4, 5[42])

Bankers' books

3.22 The Bankers' Books Evidence Act 1879 was passed in order to avoid the inconvenience of the production of bankers' books in court and to facilitate the proof of the matters recorded in them.[43] Section 3 provides that a copy of an entry in a banker's book[44] may be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded. The section accordingly creates both an exception to the rule against hearsay and an exception to the rule that a copy of a document is generally inadmissible.[45] Sections 4 and 5 provide that before the copy can be received, four conditions must be satisfied: (1) the book must have been one of the ordinary books of the bank when the entry was made; (2) the entry must have been made in the usual and ordinary course of business; (3) the book must be in the custody or control of the bank; and (4) the copy must have been examined against the original entry and found correct. The first three conditions must be proved by the oral evidence or affidavit of a partner or other officer of the bank, while the fourth must be proved by the oral evidence or affidavit of some person who has examined the copy with the original entry.

3.23 The Act is a United Kingdom statute, but the effect of section 6 of the Civil Evidence (Scotland) Act 1988, which implements a recommendation in our *Report on Corroboration, Hearsay and Related Matters in Civil Proceedings*,[46] is that sections 3 to 5 no longer apply to civil proceedings in Scotland. The Jack Report on Banking Services has recommended that sections 3 to 5 should be repealed,[47] and the Government have accepted that

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[42] There are provisions to the same effect, differing only as regards the mode of authentication, in the Prisoners and Criminal Proceedings (Scotland) Bill, Sched 3, para 1.
[43] *Waterhouse v Barker* [1924] 2 KB 759 at p 763 *per* Bankes LJ.
[44] The expressions "bank", "banker" and "bankers' books" are widely defined in s 9 of the 1879 Act.
[45] Cross, p 689, fn 9; J A Andrews and M Hirst, *Criminal Evidence* (1987), para 11.25.
[46] (1986) Scot Law Com No 100, para 3.69, rec 24.
[47] *Banking Services: Law and Practice - Report by the Review Committee* (1989, Cmnd 622), para 13.27, rec 13(6).

recommendation for England and Wales upon the view that copies of entries in bankers' books are covered by section 6(1) of the Civil Evidence Act 1968 in relation to civil proceedings and by sections 24 to 27 of the Criminal Justice Act 1988 in relation to criminal proceedings. As to Scotland, the Government await our recommendations in this Report.[48]

3.24 In the Discussion Paper we proposed that bankers' books should be subject to the same rules of law as other business documents.[49] This proposition was supported by all those who commented on it. Further consideration has confirmed our view that if our recommendations as to statements in business documents are implemented, there will be no reason why sections 3 to 5 should continue to apply to criminal proceedings in Scotland. We are informed that these provisions, which were designed to obviate the production of books of account in court, cannot be used where information has not been preserved in written form but is stored in and can be retrieved from a computer: although "bankers' books" include records kept in any form of mechanical or electronic retrieval data mechanism,[50] it is not possible to examine a "copy" with "the original entry" as section 5 requires. It appears to us that it would be both correct in principle and convenient in practice if banks, which preserve their information in the same way as many other businesses, were to be subject to the same regime as regards the admissibility and proof of the statements in their business documents. We note that Schedule 3 to the Prisoners and Criminal Proceedings (Scotland) Bill is not intended to affect the operation of the 1879 Act, so that in circumstances where it is possible to proceed under the Act the party seeking to prove the entry would be able to choose whether to do so by means of the Act or by means of the provisions in Schedule 3. The position in Scotland would then be similar to the present position in England, where a party may use either the 1879 Act or section 24 of the Criminal Justice Act 1988. We think, however, that it would be found in practice that the 1879 Act offered no advantages over the new law. We therefore **recommend:**

> **20. Sections 3 to 5 of the Bankers' Books Evidence Act 1879 should not apply to criminal proceedings.**

(Draft Bill, clause 6(5) and Schedule[51])

3.25 If sections 3 to 5 of the 1879 Act are repealed, it would seem difficult to justify the retention of section 6, which provides that in any legal proceedings to which a bank is not a party, a banker or officer of that bank is not compellable to produce any bankers' book the contents of which can be proved under the 1879 Act or the Civil Evidence (Scotland) Act 1988, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a judge made for special cause. If our recommendations as to statements in business documents are implemented in legislation and the contents of a document kept by the bank could be proved under that legislation, a witness from the bank would not be required to produce the original document (where an original existed) or to prove the contents of the document unless the court made a direction under the "unless the court otherwise directs" provision. Bankers and officers of banks would be protected from the inconvenience of producing original documents and attending court to prove their

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[48] *Banking Services: Law and Practice* (1990, Cmnd 1026), para 7.5.
[49] DP, para 6.8, 6.9, prop 18.
[50] 1879 Act, s 9(2), as amended.
[51] Nothing in Sched 3 to the Prisoners and Criminal Proceedings (Scotland) Bill affects the operation of the 1879 Act: see Sched 3, para 6(1)(b), and para 3.24 above.

contents in the same way as the employees of other businesses, and to substantially the same extent as by section 6.[52] Section 6 appears to be likewise redundant in civil proceedings, where bankers' books are covered by the broad general provisions of the Civil Evidence (Scotland) Act 1988 as to documentary evidence and hearsay. We **recommend:**

21. Section 6 of the Bankers' Books Evidence Act 1879 should be repealed.

(Draft Bill, clause 6(5) and Schedule[53])

Criminal Justice Act 1988, sections 30, 31

3.26 In the final paragraph of our Discussion Paper we drew attention to what then were clauses 29 and 30 of the Criminal Justice Bill, and now are sections 30 and 31 of the Criminal Justice Act 1988.[54] Section 30 makes an expert report admissible without the necessity of the maker's giving oral evidence, subject to the leave of the court. Section 31 makes provision for rules enabling the court to allow, or require, the furnishing of evidence in comprehensible form, including glossaries. We made no proposals in relation to either of these matters, and received none from our consultees. We therefore make no recommendations on these matters.

Transitional provision

3.27 If our recommendations are implemented, it would be clearly unreasonable for them to be made applicable to proceedings which had been commenced before the legislation came into force, because that might disrupt arrangements already made for the leading of evidence in these proceedings. Solemn proceedings for this purpose should be taken to have been commenced when the indictment was served.[55] We therefore **recommend:**

22. (1) Recommendations 1-21 should not apply to

(a) proceedings commenced; or

(b) where the proceedings consist of an application to the sheriff by virtue of section 42(2)(c) of the Social Work (Scotland) Act 1968, an application made,

before the legislation implementing these recommendations comes into force.

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[52] There would be no substantial difference in practice between a direction made under the new legislation and an order made for special cause.
[53] There is no corresponding provision in the Prisoners and Criminal Proceedings (Scotland) Bill.
[54] DP, para 6.15.
[55] On the commencement of summary proceedings see *Lees v Lovell* 1992 SCCR 557.

(2) For the purposes of this recommendation solemn proceedings are commenced when the indictment is served.

(Draft Bill, clause 6(3)(b), (4)[56])

[56] The Prisoners and Criminal Proceedings (Scotland) Bill, Sched 3, para 6(1)(c), (2) is in similar terms.

Part IV Proof of undisputed facts

Introduction

4.1 In this Part we recommend the introduction of a new procedure whereby facts which are not in dispute between the prosecution and the defence may be established at the trial without proof by means of evidence. The object of our recommendation is to increase the efficiency of Scottish criminal procedure by reducing inconvenience to witnesses and saving the time of courts and juries without infringing the principle of fairness in criminal justice by altering the balance between the Crown and the defence to the detriment of the accused. In the Scottish criminal courts there are already certain procedures whereby undisputed facts may be treated as established without evidence, but there is widespread concern that those procedures are not used as often as they could be and the time of courts and witnesses continues to be wasted while evidence is given of matters about which there is no controversy between the Crown and the defence.

4.2 We shall begin by reviewing briefly the present law and practice as to the proof of undisputed facts,[1] identifying the need for reform[2] and discussing the proposal in Part II of our Discussion Paper that a witness's evidence should be admissible in the form of a written statement signed by the witness, subject to the right of other parties and the judge to require the witness to give evidence in court.[3] We shall then explain that, having examined the views of those who commented on that proposal, we have decided not to pursue it.[4] We shall notice the constraints on reform in this area which are imposed by the Scottish system of trial,[5] and we shall go on to recommend a procedure whereby facts stated in a document served on the defence by the prosecutor may be deemed to have been conclusively proved provided that the defence do not object.[6] This recommendation is derived from a suggestion made by certain of our consultees and is a development of an existing procedure for the proof of routine matters. Like that procedure, our recommended procedure could only be used for the proof of uncontroversial matters and could not be used to exclude evidence of matters of critical importance which were disputed by the defence. We consider, however, that the operation of our recommended procedure could substantially reduce inconvenience to witnesses and result in a significant improvement in the efficient use of the time of the courts.

The present law

4.3 Under various statutory provisions there are three techniques whereby undisputed facts may be established, or proof of such facts may be assisted. (1) Facts may be established without evidence if they are formally admitted or agreed.[7] (2) Certain facts may be held as

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[1] Paras 4.3-4.6 below.
[2] Paras 4.7-4.10 below.
[3] Paras 4.11, 4.12 below.
[4] Paras 4.13, 4.14 below.
[5] Paras 4.15-4.21 below.
[6] Paras 4.22 ff below.
[7] See para 4.4 below.

admitted by the accused in the absence of challenge.[8] (3) Certain certificates and reports are sufficient evidence of the facts contained in them in the absence of challenge.[9] We explain those techniques in the following paragraphs.

4.4 Formal admissions and agreements are provided for by the Criminal Procedure (Scotland) Act 1975.[10] Where the accused is legally represented, it is not necessary for either party to prove any fact which is admitted by the other or to prove any document the terms and application of which are not in dispute between them. An admission is made by a signed minute of admission, and an agreement by a signed joint minute of agreement, and the facts and documents so admitted or agreed are deemed to have been duly proved. We discuss below the extent to which such minutes are used in practice.[11]

4.5 Several statutory provisions have the effect that certain facts are held as admitted by the accused in the absence of challenge.[12]

4.6 Other statutes provide that certain documents are sufficient evidence of the facts stated in them in the absence of challenge. The most important of these provisions are contained in section 26 of the Criminal Justice (Scotland) Act 1980. Since we shall be making frequent reference to these provisions of section 26 later in this Report, they are reproduced in Appendix C. Section 26(1) is concerned with evidence by certificate as to proof of certain routine matters in trials for offences regarding speeding, controlled drugs, immigration, false statements to obtain State benefits, counterfeiting, video recordings and television licences,[13] while section 26(2) deals with forensic science reports in summary proceedings. A certificate under section 26(1) is sufficient evidence of the matter certified, and a report under section 26(2) is sufficient evidence of any fact contained in it; but if the certificate or report is tendered on behalf of the prosecution, it is sufficient evidence of the matter or fact only where a copy has been served on the accused and the accused has not served notice on the prosecutor that he challenges any of the contents of the certificate or report.[14] Section 26(7) makes similar provision in relation to the evidence of only one of the pathologists or forensic scientists who have signed an autopsy or forensic science report: the evidence of the single signatory is sufficient evidence of any fact in the report if the prosecutor has intimated to the accused that it is intended to call only that witness and the accused has not served notice on the prosecutor that he requires the attendance of the other signatory.[15]

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[8] See para 4.5 below.
[9] See para 4.6 below.
[10] 1975, c 21 (hereafter "the 1975 Act"), ss 150 (solemn procedure), 354 (summary procedure). See R W Renton and H H Brown, *Criminal Procedure According to the Law of Scotland* (5th ed, 1983, ed G H Gordon, hereafter "Renton and Brown"), para 18-05. Differences in terminology between the two sections may not be significant: *Jessop v Kerr* 1989 SCCR 417, commentary. For further comment on the terminology see *Criminal Procedure in Scotland (Second Report)* (1975, Cmnd 6218), para 36.05.
[11] See paras 4.8-4.10 below.
[12] 1975 Act, ss 67, 312(x) (offence committed in a special capacity), 84 (proof as to productions); Criminal Justice (Scotland) Act 1980, c 62 (hereafter "the 1980 Act"), s 26(5) (person appearing on summary complaint is person charged by the police), s 26(6) (body identified in autopsy report is that of deceased identified in charge).
[13] 1980 Act, s 26(1) and Sched 1 as amended. For the terms of s 26(1) see Appendix C.
[14] 1980 Act, s 26(3), printed in Appendix C. The Criminal Justice (Scotland) Act 1987, c 41, s 60, makes similar provision as to certified transcripts of tape-recorded police interviews. See also the Road Traffic Offenders Act 1988, s 16 (documentary evidence as to specimens in proceedings for an offence under s 4 or s 5).
[15] See Appendix C.

The need for reform

4.7 It appears to be widely recognised that the provisions of the 1975 Act as to admissions and agreements,[16] and of section 26 of the 1980 Act as to the proof of routine matters by certificate and the proof of the contents of a forensic science report in summary criminal proceedings,[17] do not deal adequately with the problems of expense and inconvenience which continue to be caused by the leading of unchallenged evidence in criminal trials.[18] It is already intended that the scope of the matters to which section 26 applies should be extended. The Prisoners and Criminal Proceedings (Scotland) Bill, which is proceeding through Parliament at the time of writing this Report (July 1992), makes a number of additions to the list of matters in Schedule 1 to the 1980 Act in respect of which sufficient evidence may be supplied by certificate.[19] We assume that Parliament will take this opportunity of amending that list as it sees fit, and we therefore do not refer further in this Report to the extension of the application of section 26 in that way as a means of establishing without evidence facts which are not in dispute.

4.8 Notwithstanding the proposed extension of section 26, there remains a need for reform because the provisions of the 1975 Act as to admissions and agreements[20] are used only to a limited extent. This has been the subject of comment on several occasions. In 1975 the Committee on Criminal Procedure in Scotland chaired by Lord Thomson expressed concern at the prolongation of trials by the Crown's being required to adduce witnesses to give evidence about matters upon which they would not be cross-examined. The Committee recorded their view that much more use should be made of minutes of admission and agreement especially in relation to purely formal matters such as the proof of productions and facts not in dispute.[21] In 1980 procurators fiscal were instructed by the Lord Advocate that it was part of their duties to meet defence solicitors for the purpose of arranging minutes of admission in respect of evidence which was not to be contested.[22] Later in 1980 this Commission observed that the "overriding difficulty" in regard to extending the use of minutes of admission lay in providing any formal means of encouraging the use of such minutes which did not conflict with the accused's right to put the prosecution to the proof of its case.[23] Difficulties in arranging such minutes have persisted: in 1990 this Commission pointed out that defence lawyers were understandably reluctant to enter into minutes of admissions, particularly in respect of matters which, though non-controversial, were crucial for proof of the prosecution case: a witness might die, or disappear, or fail to give the expected evidence on the crucial matter, but, by signing the minute, the defence lawyer would have denied his client the benefit of that fortuitous event.[24] Later in 1990 Lord McCluskey and Lord Macaulay of Bragar, speaking in a House of Lords debate on the then

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[16] See para 4.4 above.
[17] See para 4.6 above.
[18] See paras 4.8-4.10 below.
[19] Bill, cl 36 and Sched 4.
[20] See para 4.4 above.
[21] *Criminal Procedure in Scotland (Second Report)* (1975, Cmnd 6218), para 36.04.
[22] "Procurators fiscal and defence solicitors" 1980 SLT (News) 42; (1980) 25 Journal of the Law Society of Scotland 132.
[23] *Law of Evidence* (1980) Scot Law Com Memo No 46, para B.27. We refer to this matter at paras 4.15-4.16 below.
[24] *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses* (1990) Scot Law Com No 125, para 3.13.

Law Reform (Miscellaneous Provisions) (Scotland) Bill, referred to their difficulties as defence counsel in reaching pre-trial agreements with the prosecution.[25]

4.9 The consequences of failure to reach pre-trial agreement as to matters which will not be in dispute may be readily appreciated. In every criminal trial it is necessary for the Crown to lead sufficient evidence of certain facts before the court would be entitled to convict the accused. The leading of such evidence may take some time in court but cannot be omitted in the absence of formal agreement by the defence in the shape of a minute of admission. In a trial for housebreaking, for example, the accused may intend not to challenge the fact that the housebreaking occurred but only to deny that he was the housebreaker; but if the fact that the housebreaking occurred is not formally admitted by the defence, the householder may have to be called to give evidence that his house was broken into and property stolen as specified in the charge. Similarly, in many trials for assault doctors give up time and alter appointments in order to give evidence upon which they are not cross-examined because the defence are not concerned to contradict the fact that the complainer sustained the injuries which the doctors describe. Sometimes a number of police officers who could be more usefully employed have to be called to prove that some object taken from the scene of a crime is the same object as was examined at a forensic science laboratory and is produced in court. The giving of such uncontroversial evidence by a succession of witnesses not only wastes the time of the court and the witnesses but may weary and bewilder the jury.

4.10 Such consequences of failure to agree undisputed facts have become more serious as the business of the Scottish criminal courts has grown in recent years. It is important that the increasing volume of criminal trials should be conducted in a manner which is both efficient and acceptable to the public. The leading of uncontentious evidence extends the time occupied by the trial and increases not only the cost of the trial and the burden on the time of the court and the jurors, but also the inconvenience to those members of the public who are called as witnesses. They may have to wait for hours or even days before they are called into the witness box, they may not be adequately compensated by the expenses which they are allowed, and attendance may be particularly troublesome to the self-employed or to the employers of witnesses who are important members of their staff. One category of witnesses who are particularly affected by unnecessary attendance in court are police officers. It has often been observed that the need to give uncontroversial evidence has a marked and undesirable effect on police resources in Scotland.[26] Police officers frequently have to sit in court waiting-rooms for long periods, sometimes after working on a night shift, before giving evidence on which they are not cross-examined. Indeed, as we noted in our Discussion Paper, only a small minority of the officers who are cited to attend court actually go into the witness box. This may in part be explained by the fact that many accused persons decide to plead guilty only on the morning of the trial, when the police and other witnesses are already in attendance. Even where trials do proceed, however, a significant minority of those police officers who give evidence are not cross-examined by the defence. It is acknowledged in the Justice Charter for Scotland that "too many jurors, witnesses and others take away a poor impression from their visit to court".[27] The Charter also recognises the need to make the best use of court time.[28] We share these concerns, and we consider that

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[25] HL Deb, vol 519, cols 427, 428, 17 May 1990.
[26] DP, para 2.2.
[27] *The Justice Charter for Scotland* (Scottish Office, Crown Office, Scottish Courts Administration, 1991), p 8.
[28] *Ibid*, p 10.

one way of maintaining public confidence in the criminal justice system is to minimise the inconvenience caused to those members of the public who are required to play a part in it.

Our Discussion Paper and the responses

4.11 In the Discussion Paper we put forward a proposal that there should be introduced in Scotland a procedure for proof by written statements similar to that provided for England and Wales by section 9 of the Criminal Justice Act 1967.[29] Section 9 makes admissible a witness's written statement instead of his oral evidence in court provided that certain conditions are satisfied. The principal conditions are that the statement should be signed by the maker and contain a declaration that he believes it to be true and knows that if it is used in evidence he is liable to prosecution if he knew it to be false or did not believe it to be true; that a copy of the statement should have been served on the other party or parties to the proceedings; and that none of these has served a notice of objection. Parties may agree to waive the conditions as to notice and non-receipt of objection. Even if the notice procedure is followed and no objection taken, the party who introduced the written statement may call the maker, and the court may of its own motion, or on the application of any party, require the maker to give oral evidence. Section 9 contains further elaborate provisions as to the evidence of persons under the ages of 21 or 14 and as to service and other procedural matters. It may be noted, however, that the procedure may be used by any party to the proceedings; and that since the facts in the statement are not conclusively proved by the admission of the statement, evidence which contradicts the facts stated may be led and taken into account by the court when reaching its verdict.[30]

4.12 Our proposals in the Discussion Paper, which were modelled on the provisions of section 9, ran as follows. Provisions should be made to enable the evidence of a witness to be given in court in the form of a written statement, signed by the witness. Such a statement should be served on all other parties not less than a specified number of days prior to a trial taking place; and if no counter-notice requiring the attendance of their witness in court is served within a specified number of days thereafter, the statement should be admissible to the like extent as oral evidence. Any party on whom such a statement is served should be entitled, by giving a counter-notice within the prescribed time-limit, to require the attendance as a witness of the maker of the written statement. Even where no counter-notice has been given, the court should have a discretion to declare a written statement inadmissible in the absence of its maker giving evidence in person. Where a written statement is admitted in the absence of a counter-notice, it should nonetheless be permissible for a party against whom the written statement has been used to give or lead evidence which is inconsistent with the evidence contained in the written statement. Where that happens, the party who tendered the written statement should be entitled to lead additional evidence. We asked whether the additional evidence should be restricted to that of the maker of the written statement, or other evidence in replication should be permitted.[31]

4.13 While a majority of those who commented on this proposal were in favour of it, with our without modifications, it was not approved by certain consultees with great experience of criminal practice. Their criticisms have convinced us that the proposal should be abandoned. The principal criticism was that the proposed procedure did not elide the need

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[29] 1967, c 80. See DP, paras 2.10-2.23 and Appendix I.
[30] *Lister v Quaife* (1982) 75 Cr App R 313; [1983] 1 WLR 48.
[31] DP, para 2.23, prop 1.

to have in attendance or on call witnesses to the facts in the statement. It was pointed out that even where no counter-notice had been served, the party against whom the written statement had been used could adduce evidence inconsistent with it, and the party who tendered the statement would then be entitled to lead additional oral evidence. Criticism was also directed against the proposal that the court should have a discretion to declare the statement inadmissible in the absence of its maker giving evidence in person, on the ground that the party tendering the statement could not safely dispense with the attendance of the maker of the statement at the trial. The proposal would accordingly fail in its object of eliminating the need for witnesses to attend court.

4.14 There were also several cogent criticisms of the proposal on practical grounds. It was said, correctly, that the proposal was based on English practice with regard to written statements which had no counterpart in Scotland. In England, typewritten statements are prepared by the police, signed by the witnesses and tendered in committal proceedings. There are no equivalent statements in Scottish practice: on the one hand there are statements written by police officers in their notebooks, often in circumstances of emergency or informality, which are sometimes unreliable; and on the other hand there are precognitions prepared by procurators fiscal or precognition officers. A written statement such as was envisaged in the proposal would have to be specially prepared and edited. Indeed we note that in England the preparation and editing of written statements which are to be tendered in evidence under section 9 of the Criminal Justice Act 1967 or section 102 of the Magistrates' Courts Act 1980 is the subject of an important and elaborate Practice Direction.[32] It deals with such matters as the preparation of composite statements where witnesses have made more than one statement; the editing of statements containing inadmissible, prejudicial or irrelevant material; methods of editing statements and circumstances in which fresh statements should be prepared. We have no doubt that similar guidance would have been required in Scotland. While we appreciate that the proposal would have involved substantial consequential changes in practice, we consider that the primary and insuperable criticism is that the proposal would not achieve its object of saving the time of the court and potential witnesses. We have therefore decided that the proposal should not be recommended. We have greatly benefited, however, from the practical criticisms and suggestions of our consultees when devising the alternative proposal which we recommend below.[33]

The constraints of the Scottish criminal trial system

4.15 When attempting to devise a procedure whereby undisputed facts may be established without evidence, it is necessary to observe certain constraints on reform in this area which are imposed by certain of the principles underlying the Scottish system of criminal trial. The first of these is that, in general, the accused is entitled not to disclose his defence before the trial[34] and to put the prosecution to proof of its case;[35] and the second is that decisions as to what evidence is to be adduced are for the parties, and not for the judge.

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[32] *Practice Direction (Crimes: Evidence by Written Statements)* [1986] 1 WLR 805; [1986] 2 All ER 511.

[33] See paras 4.22 ff below.

[34] Other than, in solemn procedure, a special defence (the established categories are alibi, insanity at the time of the crime, incrimination and self-defence; and see *Ross (Robert) v HMA* 1991 SCCR 823, 1991 SLT 564) or, in summary procedure, alibi or insanity in bar of trial (1975 Act, ss 339, 375(3)).

[35] There is no burden of proof on the accused except where he alleges insanity or diminished responsibility at the time of the crime charged, or where a burden of proof is imposed by statute: *The Laws of Scotland: Stair Memorial Encyclopaedia* (hereafter "*Encyclopaedia*") vol 10 (1990), paras 753-757.

So long as these principles are maintained, it is not possible to contemplate the introduction of any procedure which would require an accused to make any admission against interest before the trial, or which would confer on the judge power to override any objection which the accused might have to the making of such an admission. We now offer some further explanation of each principle and its implications.

4.16 The first principle is sometimes referred to as "the right of silence". We find this an unhelpful expression and would adopt the observations of Lord Mustill in a recent case:[36]

> "This expression arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute."

It is sufficient to say that we are here concerned with the rule that throughout a criminal trial the prosecution bears the burden of proving that the accused committed the crime libelled against him.[37] He must prove every issue except those of insanity and diminished responsibility, where either is put forward as a defence by the accused, and any issue as to which a persuasive burden of proof is laid on the accused by statute. Thus, the defence usually does not have to prove anything, and is not required to make any admissions. The present law is clearly stated in the *obiter dicta* of the Lord Justice-General in *Beattie v Scott*.[38] Having referred to the fact that the accused in that case had been required to stand up in the dock to assist a witness in identifying him, his Lordship continued:

> "But that still begs the question whether an accused person should ever be required to assist the Crown in any way in the presentation of the evidence at his trial. In my opinion that question admits of only one answer and that is in the negative. No doubt a proper balance must be struck between the interests of the public on the one hand and the interests of the accused on the other, and questions of degree may arise both before and after full committal as to what may be done by way of investigation of the crime. But the stage of investigation is completed when the case comes to trial and at that stage the interests of the accused person demand that the Crown should prove its case against him without any assistance whatever on his part."

It follows that, in the words of the Law Reform Commission of Australia:[39]

> "The accused can … insist upon matters being proved in accordance with the letter of the law whether matters are in issue or not."

He therefore has a chance of being acquitted because some matter which is not in issue but is essential for proof of the prosecution case may not be proved owing to some accident such as the disappearance, illness or forgetfulness of a witness. It may be doubted whether the public interest in fairness in the administration of justice should extend to the toleration of such technical and fortuitous acquittals, but the principle is not in doubt and, so long as it remains unqualified, limits the extent to which any reform is possible. Any pre-trial procedure whereby the accused might be called on to make admissions would be operated

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[36] *R v Director of Serious Fraud Office*, Ex p Smith [1992] 3 WLR 66 at p 74.
[37] *Lennie v HMA* 1946 JC 79, 1946 SLT 212 *per* L J-G Normand at pp 80, 213; *Owens v HM Advocate* 1946 JC 119, 1946 SLT 227 at pp 124, 229 *per* L J-G Normand; *Lambie v HM Advocate* 1973 JC 53, 1973 SLT 219 at pp 57-59, 221-222, *per* L J-G Emslie.
[38] 1990 SCCR 296 at p 301; 1991 SLT 110 at p 113.
[39] *Evidence*, Law Reform Commission of Australia, Report No 38 (1987), para 43.

after the stage of investigation had been completed when, as the *dicta* in *Beattie v Scott* makes clear, the Crown must be prepared to prove its case without any assistance from him. General rules of law may be introduced to facilitate the proof of facts in criminal trials generally, such as the clauses dealing with the proof of statements in business documents in the draft Bill annexed to this Report, but the introduction of a procedure which would require accused persons to make admissions against interest in particular cases would be a different matter.

4.17 The first principle is also reflected in certain of the provisions of article 6 of the European Convention on Human Rights.[40] Although the Convention is not part of the law of Scotland[41] or England,[42] the United Kingdom has ratified it and recognises both the rights of individual petition to the European Commission of Human Rights and the jurisdiction of the European Court of Human Rights. Thus, an accused person who claims that he has been the victim of a violation by the United Kingdom of the rights set forth in the Convention may petition the Commission, who may bring the case before the Court.[43] It therefore appears to us to be desirable that wherever possible any reform of the law of Scotland which we recommend should accord with the Convention as expounded in the decisions of the European Court of Human Rights.[44] In any event we consider the Convention to be of significance as a source of principles of public policy which we should take into account when framing recommendations for the reform of the law.[45]

4.18 The article of the Convention which is relevant to the present discussion is article 6, which provides:

> "(1) In the determination … of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …
>
> "(3) Everyone charged with a criminal offence has the following minimum rights:
>
> …
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; …"

We have examined several recent cases in which the European Court of Human Rights has considered alleged violations of paragraphs (1) and (3)(d) of article 6.[46] The approach of the Court, as we understand it, is a follows. The admissibility of evidence is primarily a matter for regulation by national law, and as a general rule it is for the national courts to assess the evidence before them. Further, the guarantees in paragraph (3) are specific aspects of the

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[40] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969).
[41] *Kaur v Lord Advocate* 1980 SC 319, 1981 SLT 322; *Moore v Secretary of State for Scotland* 1985 SLT 38; *Hamilton v Secretary of State for Scotland* 1991 GWD 10-624.
[42] *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696.
[43] *Eg Granger v UK* (1990) 12 EHRR 469, where a refusal to grant legal aid for an appeal to the High Court of Justiciary was held to be a violation of art 6(3)(c) taken together with art 6(1).
[44] *Champion v Chief Constable of Gwent* [1990] 1 WLR 1, [1990] 1 All ER 116 *per* Lord Ackner at pp 14, 125; *Derbyshire County Council v Times Newspapers Ltd* [1992] 3 WLR 28.
[45] J L Murdoch, "The European Convention on Human Rights in Scots Law" [1991] Public Law 40.
[46] Sub-para (d) and sub-para (e) of art 14(3) of the UN International Covenant on Civil and Political Rights (1966) are in identical terms.

right to a fair trial set forth in paragraph (1), and the Court, considering complaints of violation from the angle of paragraphs (3)(d) and (1) taken together, decides whether the proceedings considered as a whole, including the way in which evidence was taken, were fair.[47] However, a person is regarded as a "witness" for the purposes of article 6(3)(d) if a statement by him is before the trial court and is taken into account by it; and as a rule, the rights of the defence require that an accused should be given an adequate and proper opportunity to challenge and question such a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.[48] It would seem to follow that if under any new procedure an accused person was required to admit against his will, for the purposes of his trial, the truth of a statement made by a "witness" in the sense of article 6(3)(d), it could be persuasively argued that he had been placed at an unfair disadvantage by being deprived of his right to examine or have examined that witness against him.

4.19 The second principle is concerned with the role of the judge in relation to the selection of the evidence which is to be led at a criminal trial. In Scottish practice the judge has no such role. It is for each party to decide what evidence he will adduce. The judge cannot call witnesses or direct either party as to which witnesses he should call, as to the order of presentation of his witnesses[49] or, except where successful objection is taken by the other party, as to the line or manner of his examination of any witness. Exceptionally, he may authorise the taking of evidence by letter of request or on commission,[50] or the giving of evidence by a child by means of a live television link.[51] Clauses in the Prisoners and Criminal Proceedings (Scotland) Bill currently before Parliament make provision for the judge's authorisation of the giving of evidence from abroad through television links in solemn proceedings and, where a child is to give evidence, the giving of evidence on commission or the use of screens in court.[52] A further clause permits the court to order a preliminary diet in solemn proceedings where a party gives notice that there are documents the truth of the contents of which ought in his view to be admitted, or that there is any other matter which in his view ought to be agreed.[53] None of these provisions, however, gives the judge any control over the substance of the evidence which is to be given or any power to order that any matter be admitted or agreed or that any evidence or line of defence be disclosed before the trial. A Scottish trial judge, unlike his English counterpart, is not given any information about the evidence before the trial[54] and in general has no discretionary powers in relation to the admission or exclusion of evidence.[55]

4.20 Thus, any proposal that the judge should be empowered to determine at a preliminary diet or other pre-trial hearing the facts which should be deemed to be conclusively proved for the purposes of the trial would be inconsistent with the traditional role of the Scottish judge in relation to the evidence. It would be necessary for the judge to

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[47] *Kostovski (10/1988/154/208)*, para *39.*
[48] *Ibid*, paras 40-41.
[49] Ss 142 and 347 of the 1975 Act (formerly s 2 of the Criminal Evidence Act 1898) which make provision as to the stage of the defence case at which the accused should be called, seem ill-suited to Scottish practice and there is no reported example of their enforcement. See I D Macphail, *Evidence* (1987) paras 5.16-5.19.
[50] 1980 Act, s32.
[51] Law Reform (Miscellaneous Provisions)(Scotland) Act 1990, s 56.
[52] Bill, cls 32-35.
[53] Bill, cl 38. Consideration is being given to the extent to which effective use might be made of intermediate diets in summary procedure under the 1975 Act, s 337A (inserted by the 1980 Act, s 15).
[54] See para 2.63 above.
[55] See para 2.61 above.

be told about the nature of the case and of the evidence which it was intended to call before he could appreciate the significance of the facts or documents which were contended to be the appropriate subject of a minute of admissions. If the prosecution contended that the defence should be required to admit certain facts or documents, the defence would be obliged to disclose to the judge and the prosecution which of these facts or documents it did, or did not, wish to admit. We are aware that in England the Fraud Trials Committee Report made recommendations as to preparatory hearings in fraud trials which were subsequently introduced by sections 7 to 10 of the Criminal Justice Act 1987.[56] We are also aware that the terms of reference of the Royal Commission on Criminal Justice in England and Wales include the consideration of whether changes are needed in "the powers of the courts in directing proceedings, the possibility of their having an investigative role both before and during the trial, and the role of pre-trial reviews".[57] The Bar Council in its response to the Royal Commission noted that pre-trial reviews had been held on a formal basis since the practice rules for the Central Criminal Court had been introduced in 1977. They had been designed by and large to achieve the object of shortening contested trials but were failing to achieve their objective.[58] The Council observed:[59]

> "We believe that, at the pre-trial stage, the judge should be given the necessary additional powers to identify the real issues, reduce the amount of oral evidence and obtain agreement on exhibits and jury bundles. … We believe that it is important that, at the pre-trial stage, the judge should play a more interventionist role where it is possible to do so."

4.21 It is clear that careful thought and extensive consultation would be required before any reforms on similar lines could be recommended for Scotland, and that it would not be possible for us to make any such recommendations in the context of the present Report. Our Discussion Paper did not raise any large questions as to the validity of the underlying principles to which we have referred, and accordingly any recommendations which we make must be consistent with those principles.

Our recommendations in outline

4.22 In formulating our recommendations we have been influenced not only by the principles to which we have just referred but also by certain suggestions made to us by some of those who commented on the proposal in the Discussion Paper. Lord McCluskey in his response outlined a scheme which he later developed in a clause which he moved in the House of Lords as an amendment to the Bill which became the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990. The amendment was withdrawn after debate,[60] not because any doubts were expressed as to the merits of the clause but because it was thought that the recommendations of this Commission should be awaited. The amendment had been brought to our attention and we had confirmed that we would consider it. The clause has played a large part in our thinking and since we shall refer to it later in this Report it is printed in Appendix D. The procedure set out in the clause is very similar to another procedure which was suggested to us by other very experienced consultees. With these

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[56] 1987, c 38. See Archbold, *Criminal Pleading, Evidence and Practice (1992)* paras *2-212 to 2-238.*
[57] [1991] Crim L R 489; (1991) 135 Sol Jo 616. For pre-trial reviews, which are to be distinguished from preparatory hearings in serious fraud cases, see Practice Rules, 21 November 1977, and Archbold, *supra*, paras 4-59 to 4-62.
[58] General Council of the Bar, *The Bar Council's Response to the Royal Commission on Criminal Justice*, para 164.
[59] *Ibid*, para 178.
[60] HL Deb, vol 519, cols 425-431, 17 May 1990.

proposals in mind we have devised the scheme which we explain in the following paragraphs, first in outline and then in detail.

4.23 We propose that before the trial the prosecution should be entitled to serve on the defence a statement of facts which appear to be likely to be uncontroversial. It would then be for the defence to consider the statement and decide whether to challenge any of the facts contained in it. If they decided to do so, they would serve on the prosecution a counter-notice specifying the facts which they challenged; and in that event the prosecution would have to prove these facts at the trial in the ordinary way. If, however, the defence did not serve a counter-notice in respect of any fact, the unchallenged fact would be deemed to have been conclusively proved at the trial, so that oral evidence from witnesses to prove that fact would not be required. Either party, however, would be entitled to lead relevant evidence of the circumstances in which the unchallenged fact occurred, or of matters which explain how it occurred. In special circumstances the judge would be entitled to allow a late counter-notice to be served before the commencement of the trial or, after its commencement, to direct that the fact is not to be deemed to have been conclusively proved. We consider that this procedure would encourage both the prosecution and the defence to identify prior to the trial the issues which were in dispute, would save time which would otherwise be occupied by the giving of undisputed oral evidence, and would nevertheless preserve the right of each party to lead evidence relevant to the undisputed facts. It would also enable the judge to hold in special circumstances that a fact which had not been challenged should no longer be regarded as undisputed. The procedure is modelled on the provisions of section 26 of the 1980 Act which were designed to facilitate the proof of undisputed matters.[61] Clause 7 of our draft Bill therefore provides that the new procedure should be prescribed in a new section which would be inserted in the 1980 Act as section 26A. In framing this provision we have kept in view the consideration that the procedure for agreeing that facts will not be disputed should be as simple as is consistent with the need for the defence to give proper consideration to the question whether a fact should be admitted, and for the extent of any admission to be clear to the court. We now explain our recommendations in detail.

Our recommendations in detail

Solemn and summary procedure

4.24 We propose that the procedure which we recommend should be competent both in proceedings on indictment and in summary proceedings. Lord McCluskey's clause was intended to operate only in proceedings on indictment;[62] and there is no doubt that a procedure for the admission of undisputed facts would be particularly useful in a complex jury trial in which many documents or facts would otherwise have to be laboriously proved by oral evidence. We consider, however, that such a procedure might often be useful in summary proceedings - for example, in a trial for housebreaking,[63] or in a trial for an offence

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[61] See para 4.6 above and Appendix C. The procedure is also similar to one very recently recommended by a working party set up by the Bar Committee of the Bar Council and chaired by Mr Robert Seabrook QC. They recommend that the prosecution should draft a list of facts which they regard as essential to their case and not likely to be the subject of dispute, and the defence should be required to indicate well before trial which admissions they were prepared to make, which facts they would admit in a modified form, and which they would not admit. (*The Efficient Disposal of Business in the Crown Court* (General Council of the Bar, June 1992), p 51, para 631.)
[62] See Appendix D, s 26A(1).
[63] See para 4.9 above.

involving drinking and driving where the accused might be willing to agree that he had been driving but had not been drinking, or had been drinking but had not been driving. We also note that the procedure for proof by certificate in section 26(1) of the 1980 Act may be used in both solemn and summary proceedings. We therefore **recommend**:

> **23. The procedure described in the following recommendations should be competent both in proceedings on indictment and in summary proceedings.**

(Draft Bill, clause 7, section 26A(1))

Prosecutor's initiative

4.25 The present procedures for minutes of admission and joint minutes of agreement often fail to work for a variety of reasons. Neither party is obliged to initiate the procedure. Notwithstanding the Lord Advocate's instruction of 1980,[64] it is sometimes difficult for the prosecution and the defence to find an opportunity to reach a pretrial agreement. It has been said that advocates-depute, who prosecute in the High Court, have not been in a position to reach any agreement with defence counsel in the week before the trial.[65] We propose that such difficulties should be elided by placing on the prosecution the responsibility of deciding whether to initiate the new procedure. We envisage that prosecutors might be directed to consider in each case the extent to which the procedure might be used. If the prosecutor decided to serve a statement of facts on the defence, the responsibility would then pass to the defence to decide whether to serve a counter-notice.

4.26 We note that the Thomson Committee recommended that the initiative for reaching agreement on undisputed matters should lie with the Crown.[66] This appears to us to have two advantages. First, it is a potentially effective method of securing that both parties will focus their attention on the facts which are in dispute. Secondly, where at the trial a witness is required to give oral evidence which is not challenged in cross-examination and concern at that situation is expressed - whether by the court, the police, the witness or any other person or body - it will be a simple matter to identify the party with whom the responsibility lies: whether with the prosecution, for failing to identify the witness's evidence as apparently uncontroversial and to serve a statement, or with the defence, for serving an unnecessary counter-notice.[67] On the other hand this scheme may be thought to have the disadvantage that a prosecutor's labour in considering and drafting a statement of facts would be wasted in cases where a counter-notice was served. We acknowledge the risk that the prosecutor's work might sometimes be unproductive but we consider that the potential benefits to the courts and potential witnesses are such that the risk is one which should be tolerated.

4.27 We considered whether it should be possible for the defence to operate the new procedure and decided that it should not, for two reasons. First, there are the advantages which we have mentioned in placing the initiative on the prosecution. Secondly, in a case where the defence wished to propose that certain facts or documents should not be disputed

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[64] See para 4.8 above.
[65] HL Deb, vol 519, col 428, 17 May 1990 (Lord Macaulay of Bragar).
[66] *Criminal Procedure in Scotland (Second Report)* (1975, Cmnd 6218) para 36.04, rec 103.
[67] The service of a counter-notice could not be referred to during the trial: see paras 4.40, 4.41 below.

at the trial, there should be no difficulty in discussing with the prosecutor the framing of a minute of admission or a joint minute of agreement, because the prosecutor, if directed as we envisage, will have considered already the question whether any facts appear to be uncontroversial and will therefore be in a position to give informed consideration to any proposal in that regard from the defence.

4.28 We therefore **recommend:**

> **24. The responsibility for initiating the procedure described in the following recommendations should lie with the prosecutor.**

(Draft Bill, clause 7, section 26A(1))

Contents of statement

4.29 We now consider the matters which might be contained in the statement of facts served by the prosecutor. The object of the procedure is to have deemed as conclusively proved facts which will not be disputed at the trial. Accordingly, before considering whether to serve a statement of facts the prosecutor should review the facts which he requires to prove, select those which appear to him to be likely to be undisputed and then make a further selection from these of the facts which in the public interest it would be advantageous to present to the court as unchallenged facts in a statement served under the new procedure. In the selection of the facts which are unlikely to be disputed the prosecutor may be assisted by the results of the investigation into the case including the contents of any statements made to the police by the accused, or by informal discussion with the solicitor for the defence. It does not follow, however, that all the facts which are not to be, or are unlikely to be, disputed should appear in a statement of facts. The prosecutor will wish to consider whether the facts are of such a nature that a jury would understand them and appreciate their importance more easily if they were presented through the oral evidence of a witness in the witness box rather than through a statement of facts. The extent to which court time would be saved and potential witnesses would be spared the inconvenience of attendance at court are other obvious considerations.

4.30 In his amendment Lord McCluskey gave examples of assertions as to fact which might be included in a statement of facts.[68] While these are undoubtedly useful illustrations of some of the kinds of facts which might be proved under the new procedure, we would prefer not to risk any possible misunderstanding as to the scope of the procedure by including such a list in our draft Bill. In defining the kinds of facts which may be proved under the procedure we consider that it should suffice to say that they are facts which appear to the prosecutor to be uncontroversial in the circumstances of the particular case. The prosecutor may be reasonably sure that there will be no dispute about certain facts and circumstances, or about the truth of certain statements in documents which do not fall within our recommended provisions as to business documents;[69] or he may know that the accused is willing to admit that the crime charged was committed by someone but will deny that he committed it. The prosecutor will also know that if he includes in the statement an important fact which is likely to be controverted by the defence, the procedure will very probably be frustrated by the service of a counter-notice. The effective operation of the

[68] See Appendix D, s 26A(1)(a)-(g).
[69] See draft Bill, cl 1.

procedure will depend, in the first instance, on the exercise of sound judgment by an efficient prosecutor with a responsible approach to the realities of the particular case. We therefore **recommend:**

> **25. The prosecutor should be entitled to prepare a statement of facts which appear to him to be uncontroversial.**

(Draft Bill, clause 7, section 26A(1)(a))

Form of statement and counter-notice

4.31 We consider that the form of the statement of facts should be prescribed not by primary legislation but by act of adjournal. No doubt the statement would include, in the words of Lord McCluskey's amendment, "one or more simple but separate and discrete assertions as to fact".[70] Since the form would be prescribed by act of adjournal it could readily be modified in the light of experience and changing circumstances. In particular, there may be a question whether the prosecutor should be entitled to serve along with the statement of facts any material in support of the facts stated, such as statements by witnesses. We note that it is stated in the Justice Charter for Scotland that there is to be extended throughout Scotland a scheme for giving police officers' statements to the defence, and that a scheme will be tested for supplying statements by other witnesses provided that these witnesses agree.[71] Our recommendations are not intended to exclude the service of such statements or any other relevant material such as copies of documents. If, by the time that these recommendations are considered, the schemes referred to have been assessed and it appears that witnesses' statements and other documents might with advantage be served together with the statement of facts, the form of the statement could be so worded as to refer to any documents served with it. We make a further suggestion as to the contents of the form in paragraph 4.32 below.

4.32 We do not think that it would be necessary for the form of the counter-notice to be prescribed by act of adjournal.[72] Since it is possible that a counter-notice might be written by the accused personally,[73] it seems important that its form should be as simple as would be consistent with the necessity that it should specify clearly the fact or facts in the statement which are challenged. No doubt it should be signed by the accused or by his solicitor on his behalf. We would suggest that the prescribed form of the statement might include clear advice to the accused, perhaps in the style of the form of citation served with a summary complaint,[74] as to the purpose of the statement of facts, his entitlement to serve a counter-notice, what the counter-notice should contain, the rules as to the methods and proof of service, the consequences of the service or absence of service of a counter-notice and the desirability of obtaining legal advice.

4.33 We **recommend:**

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[70] See Appendix D, s 26A(1).
[71] *The Justice Charter for Scotland* (Scottish Office, Crown Office, Scottish Courts Administration, 1991), p 10.
[72] Lord McCluskey's clause made provision for a "rejection notice" in a form prescribed by act of adjournal: see Appendix D, s 26A(2).
[73] As to unrepresented accused persons, see para 4.54 below.
[74] Act of Adjournal (Consolidation) 1988, r 87(3), Sched 1, Form 47.

26. The statement of facts should be in such form as may be prescribed by act of adjournal.

(Draft Bill, clause 7, section 26A(9))

Service of statement and counter-notice

4.34 We now consider the timetable and other procedural details regarding the service of statements of fact and counter-notices. We deal first with the statement of facts. Like any other document of importance in criminal proceedings it should be signed by or on behalf of the party tendering it, and it should therefore be signed by or on behalf of the prosecutor. We **recommend:**

27. The statement of facts should be signed by or on behalf of the prosecutor.

(Draft Bill, clause 7, section 26A(1)(b)(i))

4.35 Since the procedure is a development of that provided for proof by certificate or report in section 26 of the 1980 Act, we consider that, subject to what we say in the next paragraph, it is appropriate to apply the same timetable for service.[75] Accordingly, a copy of the statement should be served on the accused not later than[76] 14 days before his trial. Section 26(3)(b) requires the accused to serve a counter-notice "not less than 6 days[77] before his trial, or by such later time as the court may in special circumstances allow". We consider that the same rule should apply to counter-notices, subject to there being an ultimate time-limit, which we think should be the commencement of the trial. More precisely, in solemn proceedings the time-limit should be the time when the oath is administered to the jury,[78] and in summary proceedings, the time when the first witness is sworn.[79] Before either of these stages is reached the case will have been called and the prosecutor should have tendered the statement of facts to the court. The defence would then have an opportunity to move the court for leave to serve a late counter-notice.[80] We consider that that should be a final opportunity because it would be destructive of fair and orderly procedure to permit, unless in special circumstances, a belated challenge of a fact in the statement in the course of the trial when it might be difficult or even impossible to procure the attendance of a witness or witnesses to prove the fact. We deal later with special circumstances in which it becomes apparent in the course of the trial that a purported fact in the statement which has not been challenged has been, or may have been, inaccurately stated.[81] In the event of the service of a late counter-notice, whether on or before the day of the trial, the prosecutor would no doubt be permitted to lead evidence in order to prove the facts stated in the notice and might seek an adjournment or postponement of the trial.

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[75] 1980 Act, s 26(3): see Appendix C.
[76] The words "not later than [so many] days before" and event indicate that both the first day and the last day are to be excluded in computing the period in question: *McMillan v HMA* 1982 SCCR 309, 1983 SLT 24.
[77] Ie 6 clear days: see footnote above.
[78] Renton and Brown, paras 14-47, 18-67. Where the accused has been unable to give due notice of his witnesses and productions he must so show before the jury is sworn: 1975 Act, s 82(2).
[79] For the purposes of the 40-day rule (which limits the accused's pre-trial detention in custody) the trial is taken to commence when the first witness is sworn: 1975 Act, s 331A(4) inserted by the 1980 Act, s 14(2).
[80] See para 4.43 below.
[81] See paras 4.44-4.48 below.

4.36 We have noted above the provision in the Prisoners and Criminal Proceedings (Scotland) Bill for the extension of the preliminary diet procedure in solemn cases to enable a party to give notice that in his view the truth of the contents of documents or any other matter ought to be agreed.[82] Notice may be given at any time within the period from service of the indictment to the trial diet. It may be considered that the timetable which we have proposed above should be altered to enable the accused's service of a counter-notice to be brought to the attention of the court at a preliminary diet. Our provision that a copy of the statement of facts should be served on the accused not less than 14 days before his trial would no doubt still be suitable, but the provision that the accused should serve his counter-notice not less than 6 days before his trial would not leave sufficient time for an effective preliminary diet to be held. It should perhaps be replaced by a provision that the counter-notice be served within a specified period from the service of the copy of the statement of facts. Similarly, if it is desired to make use of intermediate diets in summary procedure for the purpose of considering whether there are matters in a statement of facts which should not be disputed,[83] the timetable might require to be adjusted. We have already noted that under the present law the court has no power to override a party's unwillingness to make an admission and that this is a matter which we cannot pursue in this Report.[84] We therefore only draw attention to the possible alteration of the timetable for service to take account of preliminary and intermediate diets without making any recommendations. We make observations later on the absence of any effective sanction for unnecessary challenges made under our recommended procedure.[85]

4.37 We **recommend:**

28. The copy statement of facts should be served on the accused not later than 14 days before the trial.

(Draft Bill, clause 7, section 26A(1)(b)(ii))

29. Any notice that accused challenges any matter contained in the statement (a "counter-notice") should be served on the prosecutor not less than 6 days before the trial or by such later time as the court may in special circumstances allow, being not later than in the case of -

(a) proceedings on indictment, the time when the oath is administered to the jury; or

(b) summary proceedings, the time when the first witness is sworn.

(Draft Bill, clause 7, section 26A(3), (7))

4.38 We consider that the arrangements for the service of copy statements of fact and of counter-notices should be as in section 26(4) of the 1980 Act[86] and section 60 of the Criminal Justice (Scotland) Act 1987.[87] The documents to which they refer may be served personally,

[82] See para 4.19 above.
[83] See para 4.19 above, footnote.
[84] See paras 4.15-4.21 above. The 1975 Act does not provide any sanctions for failure to agree matters at a preliminary or intermediate diet.
[85] See para 4.59 below.
[86] See Appendix C.
[87] See also the Road Traffic Offenders Act 1988, c 53, s 16(5)(b).

or by registered post or recorded delivery. Service is proved by a written execution purporting to be signed by the person who served the document together with, where appropriate, a post office receipt. It would be for the prosecutor to select the form of service which was appropriate in the circumstances of each case. We have considered a suggestion that there should be provision for intimation by the defence solicitor to the prosecutor that he acts for the accused, and for service on that solicitor. We think, however, that it would not be appropriate to introduce such provisions in respect of one class of documents only, and that the new procedure should be regarded as essentially a development of the provisions already made in section 26.

4.39 We **recommend:**

> **30. The provisions as to service of copy statements of fact and of counter-notices should be the same as in section 26(4) of the Criminal Justice (Scotland) Act 1980.**

(Draft Bill , clause 7, section 26A(10))

Effect of service of counter-notice

4.40 Where a counter-notice has been served, the matters in the statement which it challenges cannot be deemed to have been conclusively proved, and the prosecutor must therefore establish them at the trial by adducing evidence. We have considered whether it is necessary to provide expressly that the fact that a counter-notice has been served should not be referred to at the trial. In many cases that fact might not be relevant to any issue of fact or credibility, but we cannot exclude the possibility that a prosecutor might wish to found upon it. We do not think that the approach of the defence to the question whether to serve a counter-notice should be influenced by such a consideration. Service of the copy statement or the counter-notice should not, therefore, be commented on or referred to in the presence of the jury[88] or before the judge in a summary trial is satisfied that the charge concerned is proved. A further matter to be taken into account is that where there were more than one accused, unfortunate situations could arise if one of them, A, challenged a matter in the statement and another, B, did not. An attempt might be made to embarrass A in cross-examination by asking him why he alone had challenged the matter. Moreover, the matter would be deemed to have been conclusively proved against B, but as against A the prosecutor would have to lead the evidence of witnesses in order to prove it. The jury might then have to be directed that as against B they must find the matter conclusively proved, but as against A they would be entitled to find it not proved if they did not accept the evidence of the witnesses. That would not be sensible. Such a situation could arise under the present law where one co-accused makes admissions by minute, or serves a counter-notice under section 26(3)(b) of the 1980 Act, and another does not. We think, however, that it should not be allowed to arise under the new procedure. It seems preferable to provide that where a counter-notice has been served, the fact of the service of the copy statement or the counter-notice in relation to the matters challenged should not be referred to in the presence of the jury or, in a summary trial, until the judge is satisfied that the charge is proved. Such a provision would exclude not only the prosecutor's founding on the service of a counter-notice by an accused who is being tried alone, but also, where there were co-accused, his

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[88] Lord McCluskey's clause so provided: see Appendix D, s 26A(2).

founding on a statement of facts or conclusive proof of a matter against any accused if a co-accused had served a counter-notice.

4.41 We therefore **recommend:**

31. Where a counter-notice has been served

(a) the matter challenged in the counter-notice should not be deemed to have been proved; and

(b) the fact of the service of the copy statement of facts or the counter-notice in relation to any such matter should not be referred to-

(i) in proceedings on indictment, in the presence of the jury before the verdict is returned; or

(ii) in summary proceedings, before the judge is satisfied that the charge concerned is proved.

(Draft Bill, clause 7, section 26A(2), (8))

Effect of absence of counter-notice

4.42 **Conclusive proof**. We proposed that as a general rule any fact in the statement which is not challenged by a counter-notice should be deemed to have been conclusively proved. That means that any evidence intended to prove or disprove the fact would be absolutely excluded.[89] Evidence of relevant circumstances and evidence in explanation of the fact would be admissible, but the fact itself would be taken to be irrefutably established. While this may seem at first sight a drastic proposal, the whole value of the procedure depends on deeming the unchallenged fact conclusively proved. It will be recollected that the fatal weakness of the proposal in the Discussion Paper was that by allowing the leading of evidence inconsistent with the statement, and then further evidence in support of the statement, it failed in its object of saving the time of the court and potential witnesses and left the party tendering the statement uncertain as to whether the facts in the statement would be proved.[90] It is therefore important that under the new procedure all such uncertainty and confusion should be avoided as far as possible. It is necessary, however, to provide for cases in which it becomes apparent that a mistake has been made: that the defence ought to have served a counter-notice, or that the prosecutor has made an error in framing the statement of facts. We discuss such cases in the following paragraphs.

4.43 **Erroneous failure to serve counter-notice**. We propose that the general rule that the unchallenged fact should be deemed to be conclusively proved should be so qualified as to be less rigid in its effect than the law and practice with regard to admissions and agreements by minute. Facts which are so admitted or agreed need not be proved, and a party is not entitled to withdraw from such a minute. That situation has two advantages: such minutes are entered into only after due consideration, and the absence of a provision for withdrawal means that there can be no question of the diet of trial having to be deserted *pro loco et*

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[89] *Jamieson v Dow* (1899) 2 F (J) 24, 7 SLT 281; *Henderson v Wardrope* 1932 JC 18, 1931 SLT 596; *Walkingshaw v McLaren* 1985 SCCR 293.
[90] See paras 4.13, 4.14 above.

tempore because the prosecutor does not have witnesses in attendance to prove the facts stated in the minute.[91] Although the rules as to matters admitted or agreed by minute have these advantages, we have preferred to recommend a procedure which takes account of the possibilities of error in two respects. First, it provides a reasonable opportunity for what is in effect an admission by the defence to be withdrawn up to the commencement of the trial. It is possible to imagine cases in which failure to serve a counter-notice has come about through the illiteracy or ignorance of an accused who was unrepresented when the copy statement was served, or through a misunderstanding or negligence on the part of the accused's counsel or solicitor, or former counsel or solicitor. Such cases are, we think, catered for by the "special circumstances" provision for leave to serve a late notice.[92] Up to the time of the commencement of the trial, the defence in such cases would have an opportunity to take account of the fact that a copy statement had been served and to consider whether to seek leave to serve a counter-notice. While we do not attempt to define "special circumstances" we find it difficult to conceive that the court would refuse leave in circumstances where it was shown that there was a real and appreciable risk that otherwise there might be a miscarriage of justice. Examples of such circumstances might include some of those in which a plea of guilty - the most comprehensive form of admission - is allowed to be withdrawn: where it has been tendered under substantial error or misconception, or under circumstances which tend to prejudice the accused.[93]

4.44 **Error in statement suspected or discovered during trial**. Secondly, it is necessary to take account of a situation in which the defence have responsibly decided that no counter-notice is required and in the course of the trial information is obtained which contradicts a matter stated in the statement of facts, or evidence is led which raises doubts as to whether the matter stated can be the fact. Such a situation should very seldom arise because it could only result from a double fault: an error by the prosecution in making an inaccurate statement, and a failure by the defence to notice that error before the commencement of the trial. Mistakes sometimes occur, however, and when they do, some machinery for regulating the position ought to be available. It seems clear that where an unchallenged fact can be shown to be incorrect, or where it becomes uncertain whether it has been correctly stated, it should not be deemed to have been conclusively proved against the accused.

4.45 We considered whether it would suffice to leave it to the prosecutor not to found on the fact concerned in his presentation of the case to the court. He could, for example, arrange that the fact concerned would be omitted when the statement was read to the jury, or in a summary trial he could tell the judge that he was not relying on it and invite the judge to disregard it.[94] We concluded, however, that leaving the matter to the prosecutor would not meet a case where the parties were in dispute as to whether the fact concerned had been correctly stated and the prosecutor had nevertheless resolved to found on it as having been conclusively proved. We therefore decided that it would be more satisfactory if the matter were to be regulated by the judge. We noted that in England and Wales a formal admission by the prosecutor or the defendant "may with the leave of the court be withdrawn

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[91] In 1980 this Commission doubted whether a provision for withdrawal by leave of the court was desirable, for that reason: *Law of Evidence* (1980) Scot Law Com Memo No 46, para B.26.
[92] See paras 4.35, 4,37 above and 4.57, 4.58 below.
[93] See Renton and Brown, para 8-09.
[94] Judges in summary trial courts are accustomed to disregard inadmissible matters such as pre-trial press reports (*Aitchison v Bernardi* 1984 SCCR 88, 1984 SLT 343) or previous convictions of the accused which have been accidentally disclosed (*Kerr v Jessop* 1991 SCCR 27; *Robertson v Normand* 1992 SCCR 306, 1992 SLT 218).

in the proceedings for the purpose of which it is made or any subsequent criminal proceedings relating to the same matter".[95]

4.46 We recommend that a power should be conferred on the trial judge to direct that the service of a copy statement of facts in relation to a particular fact should have no effect. In other words, that fact would no longer be deemed to have been conclusively proved, and the party who wished to establish it would have to prove it by adducing evidence in the ordinary way. Where there was more than one accused, the service of the copy statement would have no effect in relation to any of them.[96] This power could be exercised in a variety of circumstances. In some cases it might be clear to all parties that the fact had been incorrectly stated, or that it was uncertain whether it had been correctly stated. In such a case an application to the judge for a direction might be made by all the parties jointly, or might be made by one party, unopposed by the others. Such cases should cause no difficulty.

4.47 In other cases the question whether the fact had been correctly stated might be a matter of dispute. We consider that a contested application should be granted only in special circumstances, the same criterion as for leave to lodge a late counter-notice.[97] It would be for the judge to decide whether the circumstances were so special that the fact concerned should no longer be deemed to have been conclusively proved, but its existence or non-existence should become an issue for the jury to resolve. The party making the application should have the burden of satisfying the judge that the "special circumstances" condition was fulfilled, because it is that party who would be seeking to alter his position: either, as prosecutor, by calling in question a fact which he had put forward as uncontroversial,[98] or, as the accused, by withdrawing his acquiescence that the fact had been correctly stated. As before, we do not attempt to define "special circumstances". Evidence casting doubt on the correctness of the fact concerned might have emerged in the course of the trial, or relevant information might have come to the knowledge of the applicant only after the commencement of the trial. The judge might be satisfied by an oral statement made at the bar, or he might require to hear evidence. There might be a motion for the adjournment of the trial in order to arrange for the attendance of witnesses. The judge might wish to be satisfied that any allegedly late discovery of information was not a device to complicate, delay or abort the trial.

4.48 The circumstances in which an application might be made and the ways in which it might be disposed of in the interests of justice are so varied that it would not be appropriate to attempt to prescribe them in legislation. We **recommend:**

32. At any time after the commencement of the trial as defined in recommendation 29 above and before the speeches to the jury (in solemn proceedings) or the prosecutor's address to the judge on the evidence (in summary proceedings) the judge-

(a) may, on the motion of any party, in special circumstances;

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[95] Criminal Justice Act 1967, c 80, s 10(4). This provision does not seem to have been considered in any reported case.
[96] Cf para 4.40 above.
[97] See paras 4.35, 4.43 above and 4.57, 4.58 below.
[98] It is possible that an error in the statement of facts could favour the defence.

(b) shall, on the joint motion of the parties,

direct that the service of a copy of a statement of facts on the accused shall be of no effect in relation to any fact stated therein.

(Draft Bill, clause 7, section 26A(5), (6))

4.49 **Admissibility of relevant evidence.** Although in the ordinary case the unchallenged matters in the statement would be deemed to have been conclusively proved, and thus could not be either proved or disproved by the evidence of witnesses at the trial, it would be open to any party to lead evidence in relation to these matters: for example, evidence of the circumstances in which a fact occurred, or evidence which is intended to explain how it occurred. Thus, an accused charged with a crime of dishonesty might not dispute the fact that the stolen property was in his possession at a specified time and place; but he would still be entitled to lead evidence as to how the property came to be in his possession. We have considered whether the line between evidence in explanation of a matter and evidence in contradiction of it might sometimes be difficult to draw, but we have concluded that if the matters in the statement are selected with care and defined with precision the prospect of any blurring of that line should be remote.

4.50 **Need for attendance of witnesses.** It should be noted that the use of the new procedure would not necessarily have the result that the attendance of a witness who would have spoken to an unchallenged fact would not be required. Since evidence relevant to the fact would be admissible, either side might wish to cite the witness to give such evidence if it is within his or her knowledge. It is also possible that a person who could have given evidence of the unchallenged matter might also be a witness to some other matter which for good reasons has not been included in the statement and must be proved by his or her oral evidence. We think, however, that in many cases the procedure would be used as a substitute for the oral evidence of witnesses who were able to speak only to the matters contained in the statement.

4.51 **Comparison with 1980 Act, section 26(1), (2).** While we recommend that under the new procedure the matters in the statement should be deemed to have been "conclusively proved", the provisions of section 26 of the 1980 Act, on which the procedure is modelled, state only that the certificates or reports to which they refer shall be "sufficient evidence" of the matters contained in them. The latter expression means that corroborative evidence is unnecessary, but evidence in rebuttal may be led.[99] Under the new procedure, on the other hand, evidence in rebuttal of the unchallenged matters would be inadmissible.[100] In practice, however, we consider that the effect of the two provisions would generally be the same. When the prosecutor has operated the section 26 procedure in relation to a certificate or report and the accused has not exercised his right of challenge, the certificate or report appears to be generally accepted as not only sufficient evidence but also conclusive proof of its contents. We have not discovered any case in which an accused who has failed to challenge a certificate or report has cast any doubt on the truth of its contents.

4.52 On the effect of the absence of a counter-notice we therefore **recommend:**

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[99] *Encyclopaedia*, vol 10, para 597.
[100] See para 4.42 above.

33. Where a counter-notice has not been served-

> **(a) the facts contained in the copy statement should be deemed to have been conclusively proved; but**
>
> **(b) Any party may lead evidence of circumstances relevant to, or other evidence in explanation of, any fact contained in the statement.**

(Draft Bill, clause 7, section 26A(2), (4))

Procedure at trial

4.53 We consider that it would be inappropriate to prescribe by statute or act of adjournal the way in which an unchallenged statement of facts should be dealt with at the trial.[101] Different methods might be appropriate in different circumstances. In our view it should be for the prosecutor to decide whether to make the statement part of his case at the trial. If he so decides, he should intimate to the court at the opening of the proceedings that he lodges a statement of facts in respect of which no counter-notice has been served. That should be done in order to inform the judge, and remind the defence, of the existence of the statement of facts; and at that stage the defence would have their final opportunity to seek leave to lodge a later counter-notice.[102]

4.54 When and in what manner the unchallenged facts should be presented to the court thereafter appears to us to be essentially a matter for the prosecutor since the facts are part of his case and, like any other party, he may present his case in such a way as he sees fit subject, no doubt, to the court's seeing that the elementary principles of fairness are not transgressed. He may therefore present the facts to the court at any stage before he closes his case. In a jury trial[103] it may sometimes be prudent to guard against its becoming apparent in the course of the trial that any unchallenged purported fact in the statement cannot be or may not be the fact, by delaying the presentation until immediately before the close of the prosecution case; but in other cases it may be helpful and perfectly safe to present the facts at an earlier stage. While the defence might object to the stage selected by the prosecutor, we think it would be very seldom that the court would find it necessary, in the interests of fairness, to control the prosecutor's discretion in this respect.

4.55 At whatever stage of the trial the prosecutor chooses to place the contents of the statement before the jury, the statement, like a minute of admissions or joint minute of agreement, should normally be read aloud because it is a substitute for evidence and it is desirable that the media reporters and the public, as well as the jury, should hear all the facts on which the jury's verdict will be reached. We think, however, that there is no need for any absolute rule. There may be occasions when the effect of a statement which is necessarily long and technical could be summarised helpfully in ordinary language in terms agreed between the prosecution and the defence, and the summary read to the jury. There may be other occasions when it would assist the jury to have copies of the statement or summary. It is obvious that where any part of the statement has been challenged, only those parts which

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[101] Lord McCluskey's clause provided that the statement should be read over to the jury at a time determined by agreement between the prosecutor and the accused or their representatives or, failing agreement, at a time determined by the trial judge: see Appendix D, s 26A(4).
[102] See paras 4.35, 4.43 above.
[103] The consideration discussed here does not arise in a summary trial: see para 4.45 above.

have not been challenged should be disclosed to the jury. The challenged parts should therefore be deleted from any copies given to them. Whether the jury's copies should have the challenged parts blanked out or should be retyped with the statements of fact renumbered are matters which would be best resolved by agreement between the parties at the trial or, failing agreement, by the trial judge. Here again, however, we think that the trial judge would only rarely find it necessary to regulate such matters.

4.56 We do not consider it appropriate to make formal recommendations on any of these procedural details. Minutes of admission have been in use for many years,[104] and the way in which they are presented at the trial has never been the subject of regulation by statute or act of adjournal. We think that such regulation under our recommended procedure is likewise unnecessary.

The unrepresented accused

4.57 We have considered the question whether the use of our recommended procedure should be limited to cases where the accused is legally represented, and have concluded that there should be no such restriction. While minutes of admission or agreement may be used only where the accused is legally represented,[105] proof by certificate or report under section 26(1) or (2) of the 1980 Act, on which the recommended procedure is based, is possible whether the accused is represented or not. In principle it may seem inconsistent to impose a requirement of legal representation in any procedure for formal admission of facts when an unrepresented accused is entitled to plead guilty and thus make the most comprehensive admission of all. In practice, the prosecutor may not know before the trial whether the accused is legally represented or, if he is, the identity of his solicitor. In the great majority of the cases which proceed to trial, however, the accused is legally represented.

4.58 It is nonetheless necessary to take account of cases in which the 6-day time-limit for service of a counter-notice has expired and the accused has chosen not to be represented, or has delayed in instructing the advocate or solicitor who is to appear for him at his trial, or has instructed that advocate or solicitor only after dispensing with the services of another advocate or solicitor; and in each case the accused or his advocate or solicitor now wishes to challenge a matter in the statement of facts. We consider that the "special circumstances" provision for the late lodging of a counter-notice should minimise any risk of prejudice to the accused in such cases.[106] Where the accused is unrepresented at the trial the judge will no doubt wish to confirm that the copy statement of facts has been duly served and that the accused is aware of its significance and of his right to seek leave to serve a late counter-notice.[107] It is not for the judge to advise the accused on whether to exercise that right: clearly the choice whether to do so must remain with the accused.[108] We think that the role of the judge where the accused is unrepresented is so well understood that the "special circumstances" provision will be considered and, if the accused wishes to invoke it, will be applied if the interests of justice so require.

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[104] They were introduced into summary procedure by the Summary Jurisdiction (Scotland) Act 1908 (8 Edw VII, c 65), s 39, and into solemn procedure by the Administration of Justice (Scotland) Act 1933 (23 & 24 Geo V, c 41), s 20.

[105] 1975 Act, ss 150(1), (solemn procedure), 354(1) (summary procedure).

[106] See paras 4.35, 4.43 above.

[107] "A trial in which a judge allows an accused to remain in ignorance of a fundamental procedure which, if invoked, may prove to be advantageous to him, can hardly be labelled as 'fair'." (*MacPherson v R* (High Ct of Australia) (1981) 37 ALR 81 *per* Mason J at p 98.)

[108] *Ibid per* Brennan J at p 108; and see R Pattenden, *Judicial Discretion and Criminal Litigation* (1990) p 68.

4.59 We therefore **recommend:**

> **34. The procedure should be available whether or not the accused is legally represented.**

Practical consequences

4.60 We now consider some of the consequences which might follow the introduction of the procedure. The work of prosecutors would be increased because they would no doubt wish to consider in each case whether a copy statement of facts should be served[109] and if so to arrange for its preparation and service. It might be necessary to resolve any administrative problems which might arise if the prosecutor responsible for the statement of facts was not to be the prosecutor who conducted the trial. Defence solicitors would be required to consider whether counter-notices should be served and, if so, to draft and serve them. Here again there might be difficulties if the accused changed his counsel or solicitor before the trial and his new representative considered that a counter-notice, or a further counter-notice, was necessary - a matter which we have discussed in paragraph 4.43 above. We consider that the inconveniences of those additional duties and difficulties are outweighed by the potential benefits of the procedure in reducing inconvenience to witnesses and saving the time of courts and jurors.

4.61 It must be said at once, however, that these benefits would accrue only if the procedure was conscientiously operated by both sides. Lord Cooper observed, when discussing procedural reform, that it was necessary

> "to reckon with the inveterate conservatism of the legal profession. Several important reforms enacted in my own time have been virtually dead letters because the legal profession have simply declined to utilise them. We brought the horse to the water but he would not drink."[110]

It is possible to envisage that the statement of facts procedure might be seldom employed either because prosecutors only rarely invoked it or because it was stultified by the lodging by defence solicitors of comprehensive counter-notices as a matter of routine, irrespective of the nature of the facts in the statement. The example of judicial examination may be noted: its impact has been limited because judicial examinations are rarely sought in some areas, and where they are held, the accused is very often advised not to answer the procurator fiscal's questions.[111] Again, the procedure under section 26 of the 1980 Act, on which the statement of facts procedure is based, was said by some of our consultees to be sometimes frustrated by defence solicitors who lodged counter-notices under section 26(3)(b) apparently as a matter of policy or routine, and thereafter failed to cross-examine the witnesses cited to speak to the facts in the certificates. It is also possible for a responsible defence solicitor, who has no obstructive policy or routine and may wish to admit indisputable facts as a matter of common sense, to be obliged not to do so by a client who insists on not co-operating with the prosecutor in any way.

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[109] See para 4.29 above.
[110] "Defects in the British Judicial Machine" in Lord Cooper of Culross, *Selected Papers* 1922-1954 *(1957) 244* at p *256*.
[111] I D Macphail, "Safeguards in the Scottish Criminal Justice System" [1992] Crim L R 144 at p 147.

Sanctions

4.62 It may be thought that in view of the possible difficulties which we have just mentioned, the statement of facts procedure could with advantage be accompanied by sanctions which would require parties to operate it in a responsible manner. It would not be possible for us, however, to make any recommendations as to sanctions in this Report. In the Discussion Paper we recorded that we had considered whether it would be possible to devise any sanction against the unreasonable exercise of a right to require the attendance of witnesses (possibly involving some restriction of legal aid fees), but we had concluded that, at least in the first instance, it would be preferable to rely on the good will and common sense of practitioners to enable the new procedure (that is, the affidavit procedure which we were then considering) to work in a satisfactory manner.[112] The Discussion Paper accordingly made no provisional proposals as to sanctions. Any proposal to introduce sanctions would raise questions of principle in relation to pre-trial procedure[113] and would require to be carefully formulated and widely consulted upon before any recommendations could be made. We therefore do no more than notice, without comment, steps which might be taken consistently with the present law and practice. We have already noted that use might be made of preliminary or intermediate diets, where there is no sanction for failure to agree matters.[114] Where a counter-notice has been served and consequently a witness is cited to give evidence at some inconvenience and expense but is not cross-examined, there could not be any comment to the jury on the accused's failure or refusal "to make admissions of facts which a jury might after hearing all the evidence think that any reasonable innocent person would have been ready to make",[115] because we have recommended that no reference should be made in the presence of the jury to the service of a copy statement of facts or counter-notice.[116] The practitioner or practitioners concerned, however, might be the subject of observations to the Dean of the Faculty of Advocates, the Law Society of Scotland or the Scottish Legal Aid Board, who might wish to investigate the matter.

Transitional provision

4.63 If our recommendations in this Part of the Report are implemented, we consider that they should not apply to proceedings which had been instituted before they came into force, solemn proceedings for this purpose being taken to have been instituted when the indictment was served.[117] We **recommend:**

35. (1) Recommendations 23-34 above should not apply to proceedings commenced before the legislation implementing these recommendations comes into force.

(2) For the purposes of this recommendation solemn proceedings are commenced when the indictment is served.

(Draft Bill, clause 7, section 26A(11))

[112] DP, para 2.6.
[113] See paras 4.15-4.21 above.
[114] See para 4.36 above.
[115] *Fraud Trials Committee Report* (HMSO, 1986), para 6.92.
[116] Paras 4.40, 4.41 above.
[117] On the commencement of summary proceedings see *Lees v Lovell* 1992 SCCR 557.

Conclusion

4.64 We are aware that the impact of the statement of facts procedure on the problems of inconvenience to witnesses and wasted time in the courts may be limited if, for whatever reasons, it is not extensively used. We consider, however, that if the procedure is responsibly operated in a co-operative spirit by all concerned, it could make a significant contribution to the diminution of these problems by narrowing the scope of the matters in issue at criminal trials.

Part V Summary of recommendations

Statements in business documents

1. The Criminal Evidence Act 1965 should be repealed and replaced by a new statutory "statements in business documents" exception to the hearsay rule.

(Paragraph 2.13. Draft Bill, clause 6(5), Schedule)

2. "Criminal proceedings" for the purposes of the "statements in business documents" exception should include a hearing by the sheriff under section 42 of the Social Work (Scotland) Act 1968 of an application for a finding as to whether grounds for the referral of a child's case to a children's hearing are established, in so far as the application relates to the commission of an offence by the child.

(Paragraph 2.14. Draft Bill, clause 6(1))

3. The definitions of "statement", "document" (expanded as noted in paragraph 2.18) and "film" in section 9 of the Civil Evidence (Scotland) Act 1988 should be adopted.

(Paragraphs 2.15-2.19. Draft Bill, clause 6(1))

4. A statement to which the following recommendations apply should be admissible as evidence of any fact or opinion of which direct oral evidence would be admissible.

(Paragraph 2.20. Draft Bill, clause 1(2))

5. A statement contained in a document should be admissible in criminal proceedings as evidence of any fact or opinion of which direct oral evidence would be admissible if -

(a) the statement is contained in a document that comprises or forms part, or at any time comprised or formed part, of the documents kept by a business or undertaking, or by or on behalf of the holder of a paid or unpaid office;

(b) The statement was made or recorded in the document in the course of, or for the purposes of, a business or undertaking or in pursuance of the functions of such a holder; and

(c) the maker of the statement, or the supplier of the information on the basis of which the statement was made had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in it.

(Paragraphs 2.21-2.26. Draft Bill, clause 1(1), (2))

6. Where a statement has been made on the basis of information indirectly supplied, it should not be admissible unless each person through whom the information was supplied

was acting in the course of a business or undertaking or as or on behalf of the holder of a paid or unpaid office.

(Paragraph 2.27. Draft Bill, clause 1(3))

7. No version of the conditions in section 1(1)(b) of the Criminal Evidence Act 1965 should be applicable to statements admissible by virtue of the "statements in business documents" exception.

(Paragraph 2.28)

8. The "statements in business documents" exception should expressly exclude the admission, under that exception, of statements made by accused persons.

(Paragraph 2.33. Draft Bill, clause 6(2))

9. The "statements in business documents" exception should expressly exclude the admission, under that exception, of any statement made for the purposes of or in connection with pending or contemplated criminal proceedings or a criminal investigation.

(Paragraph 2.34. Draft Bill, clause 6(1))

10. Nothing in the statutory provisions enacting the exception should prejudice the admissibility of any evidence that would be admissible apart from these provisions.

(Paragraph 2.34. Draft Bill, clause 6(3)(a))

11. Where a statement in a business document is admissible, the following evidence relative to the maker of the statement or the supplier of the information contained in the statement should be admissible:

(a) evidence which would have been admissible as relevant to his credibility if he had been called as a witness;

(b) evidence which, if he had been cross-examined as to credibility, would have been inadmissible as being in contradiction of his answers; and

(c) evidence (to show only that he has contradicted himself) which proves that he has made, before or after making the statement or supplying the information and whether orally or not, a statement which is inconsistent with it.

(Paragraphs 2.38-2.46. Draft Bill, clause 1(4), (5))

12. Where a party has led evidence under the previous recommendation, the other party should be entitled to lead additional evidence in terms of section 149 or section 350 of the Criminal Procedure (Scotland) Act 1975 (as substituted and amended).

(Paragraph 2.47. Draft Bill, clause 5)

13. No provision should be made as to the assessment of the weight to be attached to a statement admissible under the "statements in business documents" exception.

(Paragraphs 2.48, 2.49)

14. No special provision should be made as to the admissibility of statements in business documents produced by computers.

(Paragraphs 2.50-2.57)

15. Evidence should be admissible as to the absence of a statement from a business document.

(Paragraphs 2.58, 2.59. Draft Bill, clause 3)

16. There should be no statutory discretion to exclude evidence rendered admissible in terms of the recommendations in this Part of this Report.

(Paragraphs 2.60-2.65)

Proof of business documents

17. (1) Unless the court otherwise directs, a business document should be taken to form part of the documents kept by the business concerned if it is certified as such by a docquet purporting to be signed by a person authorised to sign on behalf of the business.

(2) Where the court has made a direction under paragraph (1) above, it should be entitled to permit additional evidence to be led in terms of section 149 or section 350 of the Criminal Procedure (Scotland) Act 1975 (as substituted and amended).

(Paragraphs 3.2-3.6. Draft Bill, clauses 2, 5)

Proof that statement is not contained in business document

18. (1) The fact that a particular statement is not contained in a business document should be capable of proof by the oral evidence of an authorised person or, unless the court otherwise directs, by means of a certificate (in a form prescribed by act of adjournal) signed by such a person, without the production of any of the documents kept by the business.

(2) Where the court has made a direction under paragraph (1) above, it should be entitled to permit additional evidence to be led in terms of section 149 or section 350 of the Criminal Procedure (Scotland) Act 1975 (as substituted and amended).

(Paragraphs 3.7, 3.8. Draft Bill, clauses 3, 5)

Copies of documents

19. (1) For the purposes of any criminal proceedings, a copy of, or of the material part of, a document, authenticated in such manner as the court may approve, should, unless the court otherwise directs, be-

    (a) deemed a true copy; and

    (b) treated for evidential purposes as if it were the document itself.

(2) It is immaterial for the purposes of this recommendation-

    (a) whether or not the document itself is still in existence; and

    (b) how many removes there are between a copy and the original.

(3) In this recommendation "copy" includes a transcript or reproduction.

(4) Where the court has made a direction under paragraph (1) above, it should be entitled to permit additional evidence to be led in terms of section 149 or section 350 of the Criminal Procedure (Scotland) Act 1975 (as substituted and amended).

(Paragraphs 3.12-3.21. Draft Bill, clauses 4, 5)

Bankers' books

20. Sections 3 to 5 of the Bankers' Books Evidence act 1879 should not apply to criminal proceedings.

(Paragraphs 3.22-3.24. Draft Bill, clause 6(5) and Schedule)

21. Section 6 of the Bankers' Books Evidence Act 1879 should be repealed.

(Paragraph 3.25. Draft Bill, clause 6(5) and Schedule)

Transitional provision

22. (1) Recommendations 1-21 above should not apply to

    (a) proceedings commenced; or

    (b) where the proceedings consist of an application to the sheriff by virtue of section 42(2)(c) of the Social Work (Scotland) Act 1968, an application made,

before the legislation implementing these recommendations comes into force.

(2) For the purposes of this recommendation solemn proceedings are commenced when the indictment is served.

(Paragraph 3.27. Draft Bill, clause 6(3)(b), (4))

Proof of undisputed facts

23. The procedure described in the following recommendations should be competent both in proceedings on indictment and in summary proceedings.

(Paragraph 4.24. Draft Bill, clause 7, section 26A(1))

24. The responsibility for initiating the procedure described in the following recommendations should lie with the prosecutor.

(Paragraphs 4.25-4.28. Draft Bill, clause 7, section 26A(1))

25. The prosecutor should be entitled to prepare a statement of facts which appear to him to be uncontroversial.

(Paragraphs 4.29, 4.30. Draft Bill, clause 7, section 26A(1)(a))

26. The statement of facts should be in such form as may be prescribed by act of adjournal.

(Paragraphs 4.31-4.33. Draft Bill, clause 7, section 26A(9))

27. The statement of facts should be signed by or on behalf of the prosecutor.

(Paragraph 4.34. Draft Bill, clause 7, section 26A(1)(b)(i))

28. The copy statement of facts should be served on the accused not later than 14 days before the trial.

(Paragraph 4.35. Draft Bill, clause 7, section 26A(1)(b)(ii))

29. Any notice that the accused challenges any matter contained in the statement (a "counter-notice") should be served on the prosecutor not less than 6 days before the trial or by such later time as the court may in special circumstances allow, being not later than in the case of -

(a) proceedings on indictment, the time when the oath is administered to the jury; or

(b) summary proceedings, the time when the first witness is sworn.

(Paragraphs 4.35-4.37. Draft Bill, clause 7, section 26A(3), (7))

30. The provisions as to service of copy statements of fact and of counter-notices should be the same as in section 26(4) of the Criminal Justice (Scotland) Act 1980.

(Paragraphs 4.38, 4.39. Draft Bill, clause 7, section 26A(10))

31. Where a counter-notice has been served -

(a) the matter challenged in the counter-notice should not be deemed to have been proved; and

(b) the fact of the service of the copy statement of facts or the counter-notice in relation to any such matter should not be referred to-

(i) in proceedings on indictment, in the presence of the jury before the verdict is returned; or

(ii) in summary proceedings, before the judge is satisfied that the charge concerned is proved.

(Paragraphs 4.40, 4.41. Draft Bill, clause 7, section 26A(2), (8))

32. At any time after the commencement of the trial as defined in recommendation 29 above and before the speeches to the jury (in solemn proceedings) or the prosecutor's address to the judge on the evidence (in summary proceedings) the judge-

(a) may, on the motion of any party, in special circumstances;

(b) shall, on the joint motion of the parties,

direct that the service of a copy of a statement of facts on the accused shall be of no effect in relation to any fact stated therein.

(Paragraphs 4.44-4.48. Draft Bill, clause 7, section 26A(5), (6))

33. Where a counter-notice has not been served-

(a) the facts contained in the copy statement should be deemed to have been conclusively proved; but

(b) Any party may lead evidence of circumstances relevant to, or other evidence in explanation of, any fact contained in the statement.

(Paragraphs 4.2, 4.49. Draft Bill, clause 7, section 26A(2), (4))

34. The procedure should be available whether or not the accused is legally represented.

(Paragraphs 4.57-4.59)

35. (1) Recommendations 23-34 above should not apply to proceedings commenced before the legislation implementing these recommendations comes into force.

(2) For the purposes of this recommendation solemn proceedings are commenced when the indictment is served.

(Paragraph 4.63. Draft Bill, clause 7, section 26A(11))

Appendix A

CRIMINAL EVIDENCE (SCOTLAND) BILL

ARRANGEMENT OF CLAUSES

Clause

1. Statements in business etc documents.
2. Document as part of business etc documents.
3. Statement not contained in business etc document.
4. Production of copy document.
5. Additional evidence.
6. Interpretation of ss 1 to 4, saving, transitional provision and repeal.
7. Facts not to be disputed at trial.
8. Citation commencement and extent.

SCHEDULE: REPEALS.

DRAFT

OF A

BILL

TO

A.D. 1992.

Make provision in relation to criminal proceedings in Scotland regarding the admissibility as evidence of statements in documents kept by a business or undertaking or by or on behalf of the holder of a paid or unpaid office, and of copies of documents and regarding the proof of undisputed facts; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

Statement in business etc documents.

1.- (1) This section applies to a statement which-

(a) is contained in a document that comprises or forms part, or at any time comprised or formed part, of the documents kept-

(i) by a business or undertaking; or

(ii) by or on behalf o the holder of a paid or unpaid office; and

(b) was made or recorded in the document in the course of, or for the purposes of, a business or undertaking or in pursuance of the functions of such a holder.

(2) A statement to which this section applies shall, subject to subsection (3) below, be admissible in criminal proceedings as evidence of any fact or opinion of which direct oral evidence would be admissible if the statement was made-

(a) by a person who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in it; or

(b) on the basis of information directly or indirectly supplied by a person who had or may reasonably be supposed to have had personal knowledge of those matters.

(3) A statement shall not be admissible as evidence as aforesaid if made on the basis of information indirectly supplied by a person as mentioned in subsection (2)(b) above unless each person through whom the information was supplied was acting in the course of a business or undertaking or as or on behalf of the holder of a paid or unpaid office.

(4) Subsection (5) below applies where in any proceedings there is admitted as evidence by virtue of this section a statement made-

(a) by such a person as is mentioned in subsection (2)(a) above ("the maker"); or

(b) on the basis of information directly or indirectly supplied by such a person as is mentioned in subsection (2)(b) above ("the supplier").

(5) Where this subsection applies-

(a) any evidence which, if the maker or (as the case may be) the supplier had been called as a witness, would have been admissible as relevant to his credibility as a witness shall be admissible for that purpose in those proceedings;

(b) evidence may be given of any matter which, if the maker or supplier had been called as a witness, could have been put to him in cross-examination as relevant to his credibility as a

witness but of which evidence could not have been adduced by the cross-examining party; and

(c) evidence tending to prove that the maker or supplier, whether before or after making the statement or supplying the information, made (whether orally or not) a statement which is inconsistent with it shall be admissible for the purpose of showing that he has contradicted himself.

EXPLANATORY NOTES

Notes.

1. In the interests of brevity these notes are written on the assumption that the Bill in enacted - eg "Clause 3 implements Recommendation 15", rather than "Clause 3, if enacted, would implement Recommendation 15".

2. References to "the Prisoners, etc, Bill" are to the print of the Prisoners and Criminal Proceedings (Scotland) Bill dated 2 July 1992.

3. The references to a "business" are to any business, trade, profession or other occupation, any public or statutory undertaking, any local authority, any Government department and the holder of a paid or unpaid office.

Clause 1

This clause implements Recommendations 4, 5, 6 and 11. It makes admissible as evidence of its truth a statement which is based on personal knowledge, made for the purposes of a business and contained in a document kept by a business; and also makes admissible evidence as to the credibility and reliability of the person whose personal knowledge is the source of the information contained in the statement. The corresponding provisions of the Prisoners, etc, Bill are contained in Schedule 3, paragraph 2.

Subsection (1)

This subsection implements Recommendation 5(a) and (b) and deals with the application of clause 1. It applies to a statement which (a) is contained in a document kept by a business or undertaking or by or on behalf of the holder of a paid or unpaid office; and (b) was made or recorded in the document in the course, or for the purposes of, a business, etc.

"Statement", "document", "business", "undertaking", and "made" are defined in clause 6(1). "The holder of a paid or unpaid office" is commented on in paragraph 2.22.

Subsection (1)(a) is commented on in paragraph 2.22, and subsection (1)(b) in paragraph 2.23. They may be compared with the Prisoners, etc, Bill, Schedule 3, paragraph 2(1)(a) and (b). Paragraph 2(1)(a) is commented on in paragraphs 2.31, 2.32.

Subsection (2)

This subsection implements Recommendations 4 and 5(c). It makes it clear that the statement will be admissible in "criminal proceedings" (defined in clause 6(1)) as evidence of any fact or opinion of which direct oral evidence would be admissible (Recommendation 4; see paragraph 2.20). It also provides that the maker of the statement, or the supplier of the information on the basis of which the statement was made, should have had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in it (Recommendation 5(c); see paragraphs 2.24 to 2.26).

Subsection (3)

This subsection implements Recommendation 6 and deals with information which appears in the statement after being transmitted from the supplier of the information through an intermediary or a succession of intermediaries. To safeguard the process of transmission it requires that each intermediary should have been acting in the course of a business. It may be compared with the Prisoners, etc, Bill, Schedule 3, paragraph 2(2), commented on in paragraph 2.27.

Subsection (4)

This subsection deals with the application of subsection (5). It applies where a statement admissible by virtue of clause 1 has been made (a) by a person on the basis of his own personal knowledge of the matters dealt with in it (the maker of the statement) or (b) on the basis of information supplied by a person with such personal knowledge (the supplier of the information).

Subsection (5)

This subsection implements Recommendation 11 and makes admissible evidence relative to the credibility and reliability of the maker of the statement or the supplier of the information. The Prisoners, etc, Bill, Schedule 3, paragraph 2(3) is in similar terms.

Sub-paragraph (a)

This sub-paragraph makes admissible evidence which would have been admissible as relevant to the credibility of the maker or supplier if he had been called as a witness. (See paragraphs 2.39, 2.40.)

Sub-paragraph (b)

This sub-paragraph adapts the common law rules as to attacks on the credibility of a witness in cross-examination. (See paragraphs 2.41, 2.42.)

Sub-paragraph (c)

This sub-paragraph adapts the rules as to the admissibility of evidence that a witness has made a statement inconsistent with his evidence. (See paragraphs 2.43, 2.44.)

Document as part of business etc documents.

2. Unless the court otherwise directs, any such document as is mentioned in section 1 of this Act may in any criminal proceedings be taken to comprise or form part, or to have comprised or formed part, of the documents kept by the business or undertaking, or by or on behalf of the holder of the office, concerned if it is certified as such by a docquet purporting to be signed by a person authorised to sign on behalf of the business or undertaking, or by or on behalf of the holder, to which or to whom the document or documents relate.

EXPLANATORY NOTES

Clause 2

This clause implements Recommendation 17(1) and provides that, unless the court otherwise directs, the fact that a document is kept by a business may be proved without oral evidence if the document is certified as such by a docquet purporting to be signed by a person authorised to sign on behalf of the business to which the document relates. The expression "unless the court otherwise directs" is discussed in paragraph 3.3 and "purporting to be signed" in paragraph 3.4. The Prisoners,

etc, Bill, Schedule 3, paragraph 3, provides that the form of the docquet should be prescribed by act of adjournal, but otherwise is in similar terms.

Statement not contained in business etc document.

3.-(1) This section applies where a document -

(a) is, or at any time was, kept by a business or undertaking or by or on behalf of the holder of a paid or unpaid office; and

(b) contains statements which are admissible as evidence under section 1(2) of this Act.

(2) Where this section applies, then, in any criminal proceedings, the evidence of a person, authorised to give evidence on behalf of the business or undertaking or as or on behalf of the holder, that such a statement as is referred to in subsection (1)(b) above, being a statement of a type which it would be reasonable to expect to be contained in the document in the ordinary course of events, is not so contained shall be admissible as evidence of that fact; and such evidence shall be so admissible whether or not the whole or any part of the documents kept by the business or undertaking or by or on behalf of the holder have been produced in the proceedings.

(3) The evidence referred to in subsection (2) above may, unless the court otherwise directs, be given by means of a certificate (in a form prescribed by act of adjournal) which is signed by the person so authorised.

EXPLANATORY NOTES

Clause 3

This clause implements Recommendations 15 and 18(1) and corresponds to paragraph 4 of Schedule 3 to the Prisoners, etc, Bill. It provides that where a business keeps a document containing statements made for business purposes on the basis of personal knowledge, evidence is admissible that the document contains no such statement about a particular matter (Recommendation 15). Thus, where there is a question as to the occurrent of an event or the existence of a matter about which such a statement would ordinarily be contained in the document is the event had occurred or the matter had existed, evidence of the absence of the statement will be admissible to prove the non-occurent of the event or the non-existence of the matter. (See paragraphs 2.58, 2.59.)

Subsection (1)

This subsection deals with the application of clause 3. It applies where a document (a) is kept by a business and (b) contains statements made or recorded for business purposes and based on personal knowledge.

Subsection (2)

This subsection provides that evidence may be given of the absence from the document of such a statement as one would reasonably expect to find in it in the ordinary course of events. It also

implements in part Recommendation 18(1) by providing that the evidence may be given by a person authorised by the business, and the documents kept by the business need not be produced.

Subsection (3)

This subsection implements the remainder of Recommendation 18(1) by providing that unless the court otherwise directs, the authorised person's evidence may be given by means of a signed certificate in a form prescribed by act of adjournal. (See paragraph 2.7.)

Production of copy document.

4.-(1) For the purposes of any criminal proceedings, a copy of, or of the material part of , a document, authenticated in such manners as the court may approve, shall, unless the court otherwise directs, be-

(a) deemed a true copy; and

(b) treated for evidential purposes as if it were the document, or the material part of the document, itself.

(2) It is immaterial for the purposes of this section-

(a) whether or not the document itself is still in existence; and

(b) how many removes there are between a copy and the original.

(3) In this section "copy" includes a transcript or reproduction.

EXPLANATORY NOTES

Clause 4

This clause implements Recommendation 19(1), (2) and (3) by providing that unless the court otherwise directs, copies of any document or of the material part of any document, are to be admissible whether the document is kept by a business or not, whether it is in existence or not, and at any remove from the original, provided that the copies are authenticated in a manner approved by the court. The corresponding provision in the Prisoners, etc, Bill, Schedule 3 is paragraph 1, which does not mention copies of the material part of a document and provides a different mode of authentication, but is otherwise in similar terms.

Subsection (1)

This subsection implements Recommendation 19(1) by providing that a copy of a document, or of the material part of a document, authenticated in such manner as the court may approve, is to be deemed a true copy and treated for evidential purposes as the original, unless the court otherwise directs. On authentication see paragraph 3.16. On "unless the court otherwise directs" see paragraphs 3.17 to 3.19.

Subsection (2)

This subsection implements Recommendation 19(2) by (a) making a copy admissible whether or not the original is in existence (see paragraph 3.15) and (b) making copies admissible (see paragraph 3.14).

Subsection (3)

This subsection contains the definition of "copy" in Recommendation 19(3). It includes transcriptions of recorded sounds and reproductions of visual images (see paragraph 3.13).

Additional evidence

5.-(1) In section 149 of the Criminal Procedure (Scotland) Act 1975, in subsection (1) for the words from "where" to the end of the subsection there shall be substituted the following-

"where subsection (1A) or (1B) below applies.

(1A) This subsection applies where the judge-

(a) considers that the additional evidence is *prima facie* material; and

(b) accepts that at the time when the jury was sworn either -

(i) the additional evidence was not available and could not reasonably have been made available; or

(ii) the materiality of such additional evidence could not reasonably have been foreseen by the party.

(1B) This subsection applies where-

(a) evidence has become admissible under section 1(5)(a), (b) or (c) of the Criminal Evidence (Scotland) Act 1992; or

(b) the judge has made a direction under section 2, 3 or 4 of that Act.".

(2) In section 350 of the said Act of 1975, in subsection (1)-

(a) for the words "after the close of that party's evidence and" there shall be substituted the words "at any time";

(b) for the words from "where" to the end of the subsection there shall be substituted the following-

"where subsection (1A) or (1B) below applies.

(1A) This subsection applies where the judge-

(a) considers that the additional evidence is *prima facie* material; and

(b) accepts that at the time when the first witness was sworn either-

(i) the additional evidence was not available and could not reasonably have been made available; or

(ii) the materiality of such additional evidence could not reasonably have been foreseen by the party.

(1B) This subsection applies where-

(a) evidence has become admissible under section 1(5)(a), (b) or (c) of the Criminal evidence (Scotland Act 1992; or

(b) the judge has made a direction under section 2, 3 or 4 of that Act.".

EXPLANATORY NOTES

Clause 5

This clause implements several Recommendations as to the circumstance sin which the trial judge may allow a party to lead additional evidence: where evidence has become admissible under clause 1(5)(a), (b) or (c) (Recommendation 12; see paragraph 2.47): or where the judge has made a direction under clause 2 (Recommendation 17(2); see paragraph 3.3), 3 (Recommendation 18(2); see paragraph 3.7) or 4 (Recommendation 19(4); see paragraph 3.17). Paragraph 5 of Schedule 3 to the Prisoners, etc, Bill is to the same effect (see paragraph 2.47, final footnote).

Subsection (1)

This subsection amends section 149 of the Criminal Procedure (Scotland) Act 1975 which is concerned with the leading of additional evidence in solemn procedure. The new subsection (1A) repeats certain of the provisions of section 149(1). The new subsection (1B) contains new provisions which implement the above recommendations as regards solemn procedure.

Subsection (2)

This subsection likewise amends section 350 of the 1975 Act which makes corresponding provision for summary procedure. The subsection also corrects an apparent error in section 350 (see paragraph 2.47, first footnote).

Interpretation of ss 1 to 4, saving, transitional provision and repeal.

6.-(1) In the foregoing provisions of this Act-

"business" includes trade, professional or other occupation;

"criminal proceedings" includes any hearing by the sheriff under section 42 of the Social Work (Scotland) Act 1968 of an application for a finding as to whether grounds for the referral of a child's case to a children's hearing are established, in so far as the application relates to the commission of an offence by the child;

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

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

(b) any photograph;

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

(d) any film, negative, tape, disc or other device in which one or more visual images are recorded so as to be capable (as aforesaid) of being reproduced therefrom;

"film" includes a microfilm;

"made" includes allegedly made;

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

(a) a statement in a precognition; or

(b) any other statement made for the purposes of or in connection with-

(i) pending or contemplated criminal proceedings; or

(ii) a criminal investigation and

"undertaking" includes any public or statutory undertaking, any local authority and any government department.

(2) Nothing in the foregoing provisions of this Act shall apply to a statement made by the accused.

(3) Nothing in the foregoing provisions of this Act-

(a) shall prejudice the admissibility of a statement made by a person other than in the course of giving oral evidence in court which is admissible otherwise than by virtue of this Act;

(b) shall apply to-

(i) proceedings commenced; or

(ii) where the proceedings consist of an application to the sheriff by virtue of section 42(2)(c) of the Social Work (Scotland) Act 1968, an application made,

before this Act comes into force.

(4) For the purposes of subsection 3(b)(i) above, solemn proceedings are commenced when the indictment is served.

(5) The enactments set out in the Schedule to this Act are hereby repealed to the extent specified in column 3 of that Schedule.

EXPLANATORY NOTES

Clause 6

Subsection (1)

The following definitions are derived from section 9 of the Civil Evidence (Scotland) Act 1988, are identical to those in the Prisoners, etc, Bill, Schedule 3, paragraph 7, and are discussed in the paragraphs of the Report which are noted below:

"business" (paragraph 2.22)
"criminal proceedings" (paragraph 2.14)
"document" (paragraph 2.18)
"film" (paragraph 2.18)
"made"
"undertaking" (paragraph 2.22).

The first part of the definition of "statement", including sub-paragraph (a), is derived from section 9 of the 1988 Act. The definition in paragraph 7 of Schedule 3 to the Prisoners, etc, Bill specifically includes "an instruction, order or request". (See paragraphs 2.15 to 2.17.)

Sub-paragraph (b) of the definition of "statement" is derided from Recommendation 9 (see paragraph 2.34) and is identical to sub-paragraph (b) of the definition in the Prisoners, etc, Bill, Schedule 3, paragraph 7.

Subsection (2)

This subsection implements Recommendation 8 (see paragraph 2.33).

Subsection (3)

Sub-paragraph (a)

This sub-paragraph implements Recommendation 10 and makes it clear that hearsay statements which are admissible under the present law will continue to be admissible (see paragraph 2.34).

Sub-paragraph (b)

This is a transitional provision which implements Recommendation 22 (see paragraph 3.27) and makes it clear that clauses 1 to 5 are not to apply to proceedings commenced before the legislation comes into force.

Subsection (5)

The repeals are commented on in the notes to the Schedule.

Facts not to be disputed at trial.

7. After section 26 of the Criminal Justice (Scotland) Act 1980 there shall be inserted the following section-

"Facts not to be disputed at trial.

26A.-(1) This section applies where in any criminal proceedings (whether they are proceedings on indictment or summary proceedings)-

(a) facts appear to the prosecutor to be uncontroversial; and

(b) the prosecutor has-

(i) specified those facts, in a statement signed by him or on his behalf, as facts which, unless they are challenged under this section, shall be deemed to have been conclusively proved under subsection (2) below; and

(ii) served a copy of the statement on the accused not less than 14 days before the trial.

(2) Where this section applies, then, unless the accused or, if there are two or more co-accused, at least one of the accused has served notice on the prosecutor in accordance with subsection (3) below that he challenges any matter contained in the statement, the facts of far as unchallenged shall be deemed to have been conclusively proved.

(3) A notice under subsection (2) above shall be served not less than 6 days before the trial or by such later time as the court may in special circumstances allow, being not later than the time when the trial commences.

(4) Subsection (2) above shall not preclude a party from leading evidence of circumstances relevant to, or other evidence in explanation of, any matter contained in the statement concerned.

(5) Notwithstanding the foregoing provisions of this section, the presiding judge-

(a) may, on the motion of any party made within the relevant period, in special circumstances; or

(b) shall, on the joint motion of the parties made within the relevant period,

direct that the service of a copy of a statement on the accused under this section shall be of no effect in relation to such matter contained in the statement as is specified in the direction.

(6) In subsection (5) above "the relevant period" means the period beginning with the commencement of the trial and ending with the commencement, in the case of-

(a) proceedings on indictment, of the speeches to the jury;

(b) summary proceedings, of the address by the prosecutor to the judge on the evidence.

(7) For the purposes of sections (3) and (6) above, a trial commences, in the case of-

(a) proceedings on indictment, when the oath is administered to the jury;

(b) summary proceedings, when the first witness is sworn.

(8) Where the accused has served a notice under this section or, if there are two or more co-accused, at least one of the accused has served such a notice, then, the fact of the service of the copy of the statement under subsection (1) above so far as it relates to the matter challenged, or of the service of that notice, shall not be referred to, if the proceedings are-

(a) on indictment, in the presence of the jury before the verdict is returned;

(b) summary proceedings, before the judge is satisfied that the charge concerned is proved.

(9) A statement mentioned in subsection (1) above shall be in such form as may be prescribed by act of adjournal.

(10) A copy of a statement required to be served on the accused, or a notice required to be served on the prosecutor, under this section may either be personally served on the accused or the prosecutor (as the case may be) or sent to him by registered post or by the recorded delivery service; and a written execution purporting to be signed by the person who served such a copy or notice, together with, where appropriate, a post office receipt of

the relative registered or recorded delivery letter shall be sufficient evidence of such service.

(11) This section shall not apply in relation to proceedings commenced before the coming into force of this section; and for the purposes of this subsection solemn proceedings are commenced when the indictment is served.".

EXPLANATORY NOTES

Clause 7

This clause introduces a new procedure whereby facts which are not in dispute between the prosecution and the defence may be established at the trial without proof by means of evidence. It does so by inserting a new section 26A into the Criminal Justice (Scotland) Act 1980.

Section 26A(1)

This subsection, which implements Recommendations 23, 24, 25, 27 and 28, sets out the circumstances in which the new procedure is to apply. Briefly, it is to apply in both solemn and summary proceedings; where the prosecutor has identified certain facts which appear to him to be uncontroversial; and where he has then specified those facts in a statement signed by him or on his behalf and served the copy of the statement on the accused not less than 14 days before the trial. (See paragraphs 4.24-4.30, 4.34, 4.35).

Section 26A(2)

This subsection implements Recommendation 33(a). It provides that unless the accuse4d, or at least one of a number of co-accused, has served notice on the prosecutor that he challenges any matter contained in the statement of facts, the facts so far as unchallenged are to be deemed to have been conclusively proved. (See paragraph 4.42).

Section 26A(3)

This subsection implements part of Recommendation 29. It lays down the timetable for service of a notice by the accused on the prosecutor, ie not less than six days before the trial or by such later time prior to the commencement of the trial as the court may in special circumstances allow. (See paragraphs 4.35, 4.36.)

Section 26A(4)

This subsection implements Recommendation 33(b). It makes it clear that where matters in a statement of facts are not challenged and accordingly are deemed to have been conclusively proved, it remains open to any party to lead evidence of circumstances relevant to, or other evidence in explanation of, those matters. (See paragraph 4.49.)

Section 26A(5)

This subsection and subsection (6) implement Recommendation 32. Subsection (5) confers on the trial judge a power to direct that the service of a copy statement of facts in relation to a particular fact should have no effect. The fact would no longer be deemed to have been conclusively proved and the party who wished to establish it would have to prove it by adducing evidence in the ordinary way. The judge may so direct on the motion of any party, and must so direct if all parties agree. (See paragraph 4.44-4.48.)

Section 26A(6)

This subsection implements the part of Recommendation 32 which specifies the period during which an application may be made to the judge for a direction under subsection (5). It may be made at any time between the commencement of the trial (defined in subsection (7)) and the closing speeches.

Section 26A(7)

This subsection defines for the purposes of subsections (3) and (6) the time when the trial commences. It implements in part Recommendations 29 and 32. (See paragraph 4.35.)

Section 26A(8)

This subsection implements Recommendation 31(b). It provides that where a counter-notice has been served the fact of the service of the copy statement or the counter-notice in relation to the matters challenged should not be referred to, in a jury trial, in the presence of the jury until the verdict is returned, or in a summary trial, until the judge is satisfied that the charge is proved. (See paragraph 4.40.)

Section 26A(9)

This subsection implements Recommendation 26. (See paragraphs 4.31, 4.32.)

Section 26A(10)

This subsection implements Recommendation 30 and prescribes the requirements for service and proof of service, of copy statements of facts and counter-notices. (See paragraph 4.38.)

Section 26A(11)

This is a transitional provision which implements Recommendation 35. (See paragraph 4.63.)

Citation commencement and extent.

8.-(1) This Act may be cited as the Criminal Evidence (Scotland) Act 1992.

(2) This Act shall come into force on such days as the Lord Advocate may by order made by statutory instrument appoint.

(3) This Act extends to Scotland only.

EXPLANATORY NOTES

Clause 8

These are provisions in the usual form on short title, commencement and extent.

SCHEDULE

Section 6(5).

Repeals

Chapter	*Short title*	*Extent of repeal*
42 & 43 Vict. C.11	The Bankers' Books Evidence Act 1879	Sections 3 to 6
1965 c.20	The Criminal Evidence Act 1965	The whole Act

EXPLANATORY NOTES

Schedule

Bankers' Books Evidence Act 1879

This repeal implements Recommendations 20 and 21. The provisions of clauses 1 to 4 render sections 3 to 5 of the 1879 Act unnecessary. They have been disapplied in civil proceedings by section 6(3) of the Civil Evidence (Scotland) Act 1988. If they are repealed, section 6 of the 1879 Act will be redundant in both civil and criminal proceedings. (See paragraphs 3.22 to 3.25.)

Criminal Evidence Act 1965

This repeal implements Recommendation 1 (see paragraph 2.13). This Act also repealed by the Prisoners, etc, Bill, clause 45(3) and Schedule 7, Part I.

COMPARATIVE TABLE

This Table sets out the provisions of Schedule 3 to the Prisoners, etc, Bill which correspond to clauses 1 to 6 of the Draft Bill, and the relevant paragraphs of the Report.

Draft Bill Clause	*Prisoners, etc Bill Schedule 3, Paragraph*	*Report Paragraph*
1(1)(a)	2(1)(b)	2.22
(b)	(a)	2.23, 2.31, 2.32
(2)	(1)	2.20
(a), (b)	(c)	2.24-2.26
(3)	(2)	2.27
(4)	None	2.38
(5)(a)	(3)(a)	2.39, 2.40
(b)	(b)	2.41, 2.42
(c)	(c)	2.43, 2.44
None	(4)	
2	3	3.2-3.5
3	4	2.58, 2.59, 3.7
4(1)	1(1)	3.16-3.19
(2)(a)	(1)	3.15
(b)	(2)	3.14
(3)	(3)	3.13
5	5	2.47, 3.3, 3.7, 3.17
6(1)	7	Explanatory Notes to cl. 6(1)
(2)	None	2.33
(3)(a)	6(1)(a)	2.34
(b)	(c)	3.27
None	(b)	3.22-3.25
(4)	(2)	3.27
None	(3)	3.22-3.25

Appendix B

List of those who submitted comments on the proposals in Discussion Paper No 77.

Association of Chief Police Officers (Scotland)
Association of Scottish Police Superintendents
Court of Session Judges
Crown Office
Faculty of Advocates
Sheriff G H Gordon, QC
Mr G J Junor, Clerk to the District Court, Ettrick and Lauderdale District Council
Law Society of Scotland
The Right Hon the Lord McCluskey of Churchill
Procurators Fiscal Society
Mr J Renton, Scottish Director, Health and Safety Executive
Royal Faculty of Procurators in Glasgow
Mr James A Scott, Depute District Administrator, Renfrew District Council
Scottish Courts Administration
Scottish Law Agents Society
Scottish Legal Aid Board
Mr C Scott Mackenzie, Stornoway
Sheriffs' Association
Sheriffs Principal
University of Aberdeen, Faculty of Law

Appendix C

Section 26 of the Criminal Justice (Scotland) Act 1980 as amended.

Routine evidence

26.-(1) For the purposes of any proceedings for an offence under any of the enactments specified in column 1 of Schedule 1 to this Act, a certificate purporting to be signed by a person or persons specified in column 2 thereof, and certifyhing the matter specified in column 3 thereoff shall, subject to subsection (3) below, be sufficient evidence of that matter and of the qualification or authority of that person or those persons.

(2) For the purposes of any summary criminal proceedings, a report purporting to be signed by two authorised forensic scientists shall, subject to subsection (3) below, be sufficient evidence of any fact (or conclusion as to fact) contained in the report and of the authority of the signatories.

In the foregoing provisions of this subsection, "authorised" means authorised by the Secretary of State to make a report to which this subsection shall apply.

(3) Subsections (1) and (2) above shall not apply to a certificate, or as the case may be report, tendered on behalf of the prosecution-

(a) unless a copy has been served on the accused not less than 14 days before his trial; or

(b) where the accused, not less than six days before his trial, or by such later time before his trial as the court may in special circumstances allow, has served notice on the prosecutor that the accused challenges the matter, qualification or authority mentioned in subsection (1) above or as the case may be the fact, conclusion or authority mentioned in subsection (2) above.

(4) A copy of a certificate, or as the case may be report, required by subsection (3) above, or of a conviction or extract conviction required by subsection (8) below, to be served on the accused or of a notice required by either of those subsections or by subsection (6) or (7) below to be served on the prosecutor may either be personally served on the accused or the prosecutor (as the case may be) or sent to him by registered post or by the recorded delivery service; and written execution purporting to be signed by the person who served such certificate or notice, together with, where appropriate, a post office receipt for the relative registered or recorded delivery letter shall be sufficient evidence of service of such a copy.

(5) At any trial of an offence under summary procedure it shall be presumed that the person who appears in answer to the complaint is the person charged by the police with the offence unless the contrary is alleged.

(6) Where in a trial an autopsy report is lodged as a production by the prosecutor it shall be presumed that the body of the person identified in that report is the body of the deceased identified in the indictment or complaint, unless the accused not less than six days before the trial, or by such later time before the trial as the court may in special circumstances allow, gives notice that the contrary is alleged.

(7) At the time of lodging an autopsy or forensic science report as a production the prosecutor may intimate to the accused that it is intended that only one of the pathologists or forensic scientists (whom the prosecutor shall specify) purporting to have signed the report shall be called to give evidence in repsect thereof; and the evidence of that pathologist or forensic scientist shall be sufficient evidence of any fact (or conclusion as to fact) contained in the report and of the qualifications of the signatories, unless the accused, not less than six days before the tiral, or by such later time before the trial as the court may in special circumstances allow, serves notice on the prosecutor that he requires the attendance at the trial of the other pathologist or forensic scientist also.

(8) [Repealed by the Road Traffic (Consequential Provisions) Act 1988, Sched 1.]

Appendix D

Amendment proposed by The Right Hon the Lord McCluskey of Churchill to the Law Reform (Miscalleneous Provisions) (Scotland) Bill.

After Clause 54, insert the following new clause:

("Facts not disputed at trial.

After section 26 of the Criminal Justice (Scotland) Act 1980 there shall be inserted the following section-

Fact not disputed at trial

"26A.-(1) In any proceedings on indictment at the instance of Her Majesty's Advocate the prosecutor may serve with the indictment a "statement of facts not in dispute" and such statement shall be in the form prescribed by an act of adjournal under the Criminal Procedure (Scotland) Act 1975 and shall be signed by the Lord advocate or one of his deputes, or (in the Sheriff Court) by a Procurator Fiscal, and such statmenet may contain one or more simple but separate and discrete assertions as to fact, including without prejudice to the foregoing generality, assertions that on any specified occasion-

(a) an accused or any other person who name appears on the list of witnesses lodged with the Clerk of the Court before which the trial is to take place was in a specified place;

(b) an accused or any other such person was engaged in a specified acitivity, including, without prejudice to the foregoing generality, travelling in or on a vehicle as a passenger or driver thereof;

(c) an accsued or any other such person had posssession of any specific article;

(d) an accused or any other such person suffered specified injurities, with any specified consequences;

(e) any person named suffered fatal injuries caused in a specified manner;

(f) the accused or any person deceased made a statement in specified terms;

(g) the accused or any other named person was in a specified physical condition, including, without prejudice to the foregoing generality, a condition of intoxication or sobriety or illness or consciousness or injury.

(2) When such a statement has been served on all the accused persons named on the indictment any accused person so named may, not later than 21 days after the service of the indictment upon him, by written notice in a form prescribed by Act of Adjournal (a "rejection notice") intimate that he does not wish the statement or any part of it to be used as prescribed by subsections (3) and (4) thereof, and thereafter nothing in this section will authorise the use at the trial for any purpose whatsoever of any part of the statement which the accused has in the rejection notice intimated that he does not wish to be used; and the fact of the service of statement or the notice in relation to any such part shall not be referred to in any way at trial in the presence of the jury.

(3) In relation to any matter contrained in a statement duly served as specified in subsection (1) hereof and not mentioned in any rejection notice as metnioend in subsection (2) hereof, it shall not be necessary for the accused or the prosecutor to prove such matter, which shall be deemed to have been fully proved, without prejudice to the right of any party to lead evidence in relation to such matter.

(4) Any statement or part thereof containing any matter deemed, by virtue of this section, to have been fully proved shall be read over to the jury at a time determined by agreement between the prosecutor and the accused or their representatives or failing agreement, at a time determined by the trial Judge.".").