Preliminary Paper No 15

EVIDENCE LAW: HEARSAY

A discussion paper

The Law Commission welcomes your comments
on this paper and
seeks your response to the questions raised.

These should be forwarded to:

The Director, Law Commission, PO Box 2590,
Wellington

by Friday 14 June 1991

April 1991
Wellington, New Zealand

The Law Commission was established by the Law Commission Act 1985 to promote the systematic review, reform and development of the law of New Zealand. It is also to advise on ways in which the law can be made as understandable and accessible as practicable.

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Preface

The Law Commission's evidence reference is succinct and yet comprehensive:

> Purpose: To make the law of evidence as clear, simple and accessible as is practicable, and to facilitate the fair, just and speedy judicial resolution of disputes.
>
> With this purpose in mind the Law Commission is asked to examine the statutory and common law governing evidence in proceedings before courts and tribunals and make recommendations for its reform with a view to codification.

The evidence reference needs to be read together with the criminal procedure reference, the purpose of which is:

> To devise a system of criminal procedure for New Zealand that will ensure the fair trial of persons accused of offences, protect the rights and freedoms of all persons suspected or accused of offences, and provide effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal cases.

Both references were given to the Law Commission by the Minister of Justice in August 1989, shortly after the Commission published a preliminary paper on options for the reform of hearsay.

This is the third in a series of Law Commission discussion papers on aspects of evidence law. Papers on principles for the reform of evidence law and on the codification of evidence law are being published with this paper on hearsay. Further papers are to deal with topics such as opinion evidence, evidence of character, privilege and confessions. Some of the topics which relate particularly to criminal evidence - such as confessions, the right to silence and the privilege against self-incrimination - will be considered in conjunction with the work on criminal procedure.

Our aim is to complete our review of core evidence law by 1992. Although this may be an ambitious undertaking, we believe it is preferable to deal with the whole topic in as short a period as possible rather than undertake a process of piecemeal reform. Dealing with the topic as a whole also helps to ensure that our proposals on each aspect are consistent. The result should be more coherent reform.

Our work on evidence law is being assisted by an advisory committee comprising the Hon Mr Justice R C Savage, Judge J D Rabone, Mr L H Atkins QC and Dr R S Chambers. Mr G Thornton QC, legislative counsel, is helping with aspects of drafting and Mrs G Te Heu Heu is acting as a consultant on issues relating to te ao Maori.

As the reference progresses, the Commission will be consulting a wide range of people with special interest in evidence law. In respect of this paper we have already received valuable assistance from a number of people including Mr R Mahoney of Otago University, Dr D L Mathieson QC and Mr B W Robertson of Victoria University of Wellington.

The Commission hopes that each discussion paper will draw a wide response. Since the law of evidence is a subject of such practical significance, we particularly wish to consult and take account of the views of all those with an interest in the topic. We therefore ask that readers express their views at this and later stages of the project.

This paper does more than discuss the issues and pose questions for consideration. It includes our provisional conclusions, following extensive research and considerable preliminary consultation. It also includes a complete draft of the hearsay provisions for a code and a commentary thereon. The intention is to enable detailed and practical consideration of our proposals. We emphasise that we are not committed to the views indicated and our provisional conclusions should not be taken as precluding further consideration of the issues.

Submissions or comments on this paper should be sent to the Director, Law Commission, PO Box 2590, Wellington, if at all possible, by Friday 14 June 1991. Any initial inquiries can be directed to Paul McKnight (04 733-453).

Summary of views

1 The hearsay rule has long been part of our law of evidence. In both civil and criminal cases it excludes evidence to which a witness cannot testify directly. It applies to many kinds of evidence including documents and conduct. A plethora of exceptions has grown up around the rule, causing complication and confusion in its application and an artificial and technical approach to its interpretation.

The rule requires fundamental reform. It should operate to exclude evidence only where there are sound policy reasons for so doing. (Chapter II)

2 An evidence code should contain a narrower definition of hearsay.

Earlier statements of testifying witnesses (the rule against narrative) should not be treated as hearsay.

Implied or unintended assertions also should not be treated as hearsay. Only oral and written assertions and non-verbal conduct intended as an assertion should be regarded as hearsay.

Where necessary, earlier statements of testifying witnesses and implied assertions can be excluded under the general power relating to evidence which is unfairly prejudicial, misleading, confusing or time-wasting. (Chapter III)

3 In civil cases the hearsay rule should be effectively abolished, subject to the general power to exclude evidence which is unfairly prejudicial, misleading, confusing or time-wasting.

In criminal cases the general power is arguably an inadequate filter. Rather than abolish the rule it should be rationalised on the basis of a principle of reliability: see para 4 below. (Chapter IV)

4 In criminal cases there should be a rule that hearsay is not admissible unless the circumstances relating to the hearsay statement provide reasonable assurance that it is reliable. This approach rationalises the present rule without the need to define a large number of exceptions (which would lead to a continuation of the present complication and technicality). The aim is to ensure that only reasonably reliable hearsay evidence is admitted in terms of a clear and workable rule. (Chapter V)

5 Procedural safeguards should apply to the reception of hearsay in all cases.

In both civil and criminal cases, whenever a hearsay statement is offered in evidence other parties should be able to require an available declarant to be called, with the hearsay statement being excluded if the party offering it declines to call the declarant (unless the court finds the attendance of the declarant need not be required). There should also be an explicit right, with the leave of the court, to call or recall witnesses to meet the hearsay.

In criminal cases a party proposing to offer hearsay evidence should notify all other parties in advance so that they have time to prepare to meet the hearsay and to decide whether to require an available declarant to be called. If the other parties require the calling of an available declarant they should also give notice of this. There should be provision for the court to dispense with the notification requirements. In civil cases a formal notification procedure is unnecessary since the imposition of costs, if failure to give advance notice compels an adjournment, provides adequate incentive to notify. (Chapter VI)

6 A draft of the early sections of an evidence code and draft hearsay sections are found at the conclusion of the discussion paper.

Summary of questions

1. Should "hearsay" be defined in the terms we have indicated? (Chapter III)

2. Should the hearsay rule be effectively abolished for civil proceedings? Should the hearsay rule be rationalised for criminal proceedings? (Chapter IV)

3. If the hearsay rule is rationalised for criminal proceedings, is a test based on reasonable assurance of reliability appropriate? What circumstances should be considered when the court is determining whether a hearsay statement has a reasonable assurance of reliability? (Chapter V)

4. What safeguards should apply to the reception of hearsay in civil and in criminal proceedings? (Chapter VI)

I

Introduction

INTRODUCTION

1 Our previous discussion papers consider the principles upon which reform of the law of evidence should proceed and develop the early provisions of an evidence code. The fundamental principle proposed for the code is that all logically relevant evidence is admissible unless there are sound policy reasons to exclude it. Other early provisions of the code include the general exclusionary principle concerning unfairly prejudicial, confusing, unjustifiably expensive or unjustifiably time consuming evidence. The general exclusionary principle, however, by no means covers all the categories of evidence specifically excluded by the common law. In this paper we consider the first of the specific exclusionary rules, the important and difficult rule against hearsay.

2 The paper

- examines the present law relating to hearsay evidence;
- makes proposals for the effective abolition of the rule in civil proceedings and the rationalisation of the rule in criminal proceedings; and
- considers what safeguards might be required for the reception of hearsay in civil and criminal proceedings.

The paper also contains the draft code provisions required to implement our proposals together with a commentary thereon. The aim is to enable detailed and practical consideration of our proposals. Although the paper is the product of extensive research and considerable preliminary consultation we emphasise that our proposals are not intended to preclude further consideration of the issues in the light of comments and submissions received.

II

The hearsay rule and its problems

3 The hearsay rule broadly excludes evidence to which a witness cannot testify directly. The rule has long been a part of our law and the rationale for the rule - the existence of "hearsay dangers" - is well documented.[1] However, the rule has been severely criticised by lawyers,[2] judges[3] and law reformers. As the Northern Ireland Law Reform Advisory Committee recently commented:

> Of all the rules of evidence, the one to which most frequent reference is made in everyday court proceedings is that which the average citizen finds most baffling, the rule against the admission of hearsay evidence.[4]

Witnesses find it disconcerting and frustrating not to be able to relate what others have said. Hearsay arguments also surround the admissibility of documents which are customarily relied on in ordinary life (and indeed may be regarded as more accurate than a particular individual's

1 In our hearsay options paper (NZLC PP10, 1989, para 7) we cited the statement by the Canadian Law Reform Commission:

> A person's description of a past event might be incorrect because of five possible dangers: the danger that the person did not have personal knowledge of the event; the danger that the person did not accurately perceive the event; the danger that the person when he describes the event does not recall an accurate impression of what he perceived; the danger that the language a person uses to convey his recalled impression of the event is ambiguous or misleading; and the danger that the person describing the event might not be giving a sincere account of his knowledge (Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harv L Rev 177). All of these dangers may be explored by effective cross-examination and the adversary is denied the opportunity of exposing imperfections of perception, memory, communication and sincerity and challenging the person's testimonial qualification of first-hand knowledge if the description is not given at trial by the person with alleged first-hand knowledge of the event....

2 For instance, Cross on Evidence, (4th New Zealand ed, 1989), at 445.

3 For instance, Cooke P in R v Baker [1989] 1 NZLR 738, 741 (quoted principles paper, para 59).

4 Law Reform Advisory Committee for Northern Ireland, Hearsay Evidence in Civil Proceedings (Discussion Paper No 1, 1990).

recollection). Moreover, previous statements of a testifying witness are classified as "hearsay", although it is difficult to explain to a witness why a rule which has as its principal rationale the unreliability of second-hand information should extend to statements of someone who can actually be cross-examined.

4 The hearsay rule in fact contains two separate rules:

(a) the strict hearsay rule which applies to statements of a non-witness declarant - that is, statements of one person repeated in court by another person or in a document produced in court by another person;

(b) the rule against narrative which applies to previous statements of a testifying witness.

The hearsay rule only applies to statements which are offered as evidence of the truth of what was said. Statements may still be admissible as evidence that they were made (for instance that a complaint was made shortly after an offence). In such cases the fact-finder must take into account the existence of the statement (for instance as supporting a witness's credibility) but ignore what was stated when it comes to determining what actually happened. Explaining this to juries - and expecting them to follow the instruction - is one of the more difficult aspects of the hearsay rule.

5 The rule is so broad that it can apply to many types of evidence that are not readily recognised as hearsay. For instance, a label stating "Produce of Morocco", a sales docket, and a manufacturer's record of identification numbers stamped inside a car's engine have all been held to be hearsay.[5] Conduct equivalent to words such as pointing, waving and other gestures is also within the scope of the hearsay rule and evidence of such conduct can be excluded on that basis - although the courts have not always done so.[6]

6 The full scope of the hearsay rule is by no means clear. In particular, it is debatable to what extent the rule extends to "implied assertions", that is, statements or actions which imply a meaning not necessarily intended by the maker. The cases are conflicting and obscure. The author of Cross on Evidence acknowledges that there is authority to suggest that the rule extends to implied and

5 For instance, Patel v Comptroller of Customs [1966] AC 356; R v Romeo (1982) 30 SASR 243; Myers v DPP [1956] AC 1001 - but compare R v Rice [1963] 1 QB 857 where an airline ticket was not treated as hearsay evidence of the fact that the person named travelled on a particular flight.

6 In Alexander v R (1981) 55 ALJR 355, where a witness gave evidence that he had selected a photograph of the person he saw commit a crime, the conduct of selecting the photograph was not treated as hearsay (but compare R v Osbourne [1973] QB 678).

unintended assertions but regards the authority as weak and not supported by practical reason.[7] Others have argued that all implied assertions should logically be included because at least some of the dangers associated with hearsay apply to this kind of evidence.[8] But that would give the hearsay rule a very wide scope, extending it, for instance, to evidence that someone was seen fleeing from the scene of a crime (an "assertion" that she did it), or a captain getting into a boat (an "assertion" that he thinks it is seaworthy) or merely a letter written to someone whose mental competence is in issue (an "assertion" of his capacity to understand the matters written about).[9] The idea that an "assertion" can be anything other than something intentionally asserted or that something is "implied" when it is not implied by the maker is difficult to explain.

7 The hearsay rule applies to criminal and civil cases alike. Its history is closely associated with the development of the jury and one of the main arguments advanced in support of the rule is the jury's supposed inability to make a proper assessment of evidence which has not been tested by cross-examination. Yet there are many counter-arguments, some of which we referred to in our hearsay options paper.[10] To begin with, juries are now more sophisticated and indeed are often expected to perform complicated tasks. In any event, there are very few civil cases with a jury; and a judge sitting alone should have the requisite experience to evaluate evidence appropriately. Full application of the hearsay rule can also result in important (sometimes crucial) evidence being kept from fact-finders, constraining their ability to make a fully informed and rational judgment. This then conflicts with the general principle that relevant evidence should be admissible unless there is a good reason to exclude it. Finally, although parties have rights to confront or cross-examine adversaries, they also have the right to present and defend their case fully, something which the hearsay rule hinders.[11]

7 Cross on Evidence (7th ed, 1990), pp 515-533; and see also Tapper, "Hillmon Rediscovered and Lord St Leonards Resurrected" (1990) 106 LQR 441 (re, inter alia, the Walton case discussed in notes 16-17 and accompanying text).

8 For instance Weinberg, "Implied Hearsay and the Scope of the Hearsay Rule" (1973) 9 Melbourne Univ LR 268.

9 Wright v Doe d Tatham (1837) 7 Ad & El 313. For a discussion of this case and of the debate surrounding the definition, see Guest, "The Scope of the Hearsay Rule" (1985) 101 LQR and "Hearsay Revisited" [1988] Current Legal Problems 33.

10 Hearsay options paper, para 13.

11 Sparks v R [1964] AC 964 was a case in which the declarant's hearsay evidence could actually have exculpated the accused.

8 Some of the worst problems associated with the hearsay rule are ameliorated by the plethora of exceptions which have grown up around the rule. However, these have created their own problems. As Lord Reid said in Myers v DPP [1965] AC 1001, 1020:

> By the nineteenth century many exceptions had become well established; but again in most cases we do not know how or when the exceptions came to be recognised. It does seem, however, that in many cases there was no justification either in principle or logic for carrying the exception just so far and no farther. One might hazard a surmise that when the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently to meet that case, and without regard to any question of principle. But this kind of judicial legislation became less and less acceptable and well over a century ago the patchwork which then existed seems to have become stereotyped. The natural result has been the growth of more and more fine distinctions so that it now takes even so concise an author as Professor Cross over one hundred closely packed pages to explain the law of hearsay evidence.

The Evidence Amendment Act (No 2) 1980 also created significant statutory exceptions for first-hand documentary hearsay evidence and business records. But, as indicated in our hearsay options paper, the Act has itself led to some complication and confusion. Arguments have arisen, for instance, whether a complainant's statement recorded by a police officer is a statement made by a person who "had personal knowledge of the matters dealt with in the statement",[12] and whether a business record is made "from information supplied directly or indirectly by any person".[13] The focus is often on whether the technical conditions of the exceptions are satisfied rather than the reasons why the particular item of hearsay evidence should or should not be admitted. Moreover, changes in technology have already made some of the exceptions out of date.[14]

9 Statements in cases such as R v Baker [1989] 1 NZLR 738, discussed in detail in our principles paper, and

12 Section 3(1)(a).

13 Section 3(1)(b) and s 2 (definition of "business record").

14 For instance, only 7 years after the 1980 Act, amendments have been recommended to take account of computer technology (see Evidence Law Reform Committee, Report on Business Records and Computer Output (1987)). And the Evidence Amendment Act 1989 makes specific provision for videotaped evidence in child sexual abuse cases (a technology not referred to in the definition of "document" in the 1980 Act).

R v Smith [1989] 3 NZLR 405 indicate that the courts may in future be prepared to adopt a less technical approach to the hearsay exceptions.[15] However, there remains a large element of uncertainty as to how far judicial development of the law can be taken. The decisions have mainly been limited to evidence which might be classified as within existing exceptions to the hearsay rule. The courts' continued reluctance to make further qualifications or exceptions to the hearsay rule is illustrated by the Australian case of Walton v R (1989) 84 ALR 59. In that case, although the adoption of a flexible approach was also indicated,[16] the High Court nevertheless treated a child's greeting, "Hello Daddy", as inadmissible hearsay that he was talking to his father (even though there was little or no likelihood of mistake or falsehood on the child's part). And in respect of other hearsay evidence, the judges found it necessary to embark on a complex discussion of the law, which led to the conclusion that the mother's statement that she intended to meet the father (accused of her murder) could be admitted as evidence of her state of mind and as circumstantially probative of the fact of meeting.[17]

10 All the problems with the hearsay rule suggest it should be a source of considerable difficulty for courts and witnesses. While, however, that is often so in cases where the admissibility of hearsay evidence is contested, the fact is that the rule both can be avoided and is frequently ignored or misunderstood. Hearsay evidence, particularly in civil cases, is regularly admitted because no one objects to it. Cases such as Baker and Walton indicate that the exceptions or qualifications concerning evidence as to state of mind, statements which are made spontaneously, and statements accompanying and explaining relevant acts (commonly grouped under the res gestae doctrine) are sufficiently elastic to permit much apparently hearsay evidence to be admitted under existing law, even if elaborate reasoning and complicated jury directions may be needed to achieve that result. And in cases where hearsay evidence cannot be brought within an existing exception or qualification, provisions such as s 42 of the Evidence Act

15 In particular, Cooke P in R v Baker [1989] 1 NZLR 738, 741 (quoted principles paper para 59) and Casey J in R v Smith [1989] 3 NZLR 405, 410.

16 Especially Mason CJ at 66.

17 The reasoning was criticised by Tapper, "Hillmon Rediscovered and Lord St Leonards Resurrected", note 7, who points out the illogicality of determining that hearsay evidence of intent to act can be used to prove the action while hearsay evidence of the doing of the act cannot.

1908 sometimes enable the court to take judicial notice of the evidence.[18]

11 It might be thought that the ability to avoid the hearsay rule provides a practical way to deal with its problems. The actual result, however, is an inadequately principled and inconsistent approach to hearsay evidence. Moreover, there are still too many cases where valuable evidence is excluded on the ground that it is hearsay. Thus Zuckerman has said:

> To maintain a semblance of a rule of law, the hearsay rule exacts from its faithful exponents an amount of casuistic sophistry that increases with almost every fresh decision on the subject. It might be argued that the tension between hearsay theory and hearsay practice is a healthy one in that the theory discourages the introduction of either worthless or inferior evidence while the pragmatism of the courts secures the admission of evidence that is reliable and useful. But this tension is, in fact, far from wholesome. At the level of exposition we have the rule and its exceptions but at a practical level these do not necessarily determine admissibility. Theory dictates exclusion regardless of the probative force of the hearsay in question. Practice suggests that admission is very much a function of probative force. This diversity has meant that the pragmatism of the courts has had to remain concealed behind lip-service to the theory of hearsay. Hence decisions in individual cases depend on the extent to which the judge is familiar with the inclusionary tactics. However, the subterfuge involved in these tactics has prevented their even dissemination within the judiciary. Consequently, the ameliorating effects of pragmatism have been haphazard and limited in scope and have been achieved by a process of Byzantine complexity.[19]

18 Section 42 provides:

> All Courts and persons acting judicially may, in matters of public history, literature, science, or art, refer, for the purposes of evidence, to such published books, maps, or charts as such Courts or persons consider to be of authority on the subjects to which they respectively relate.

See, for instance, Te Rununga o Muriwhenua Inc v Attorney-General [1990] 2 NZLR 641 (findings of the Waitangi Tribunal judicially noted) and principles paper, para 75.

19 Zuckerman, The Principles of Criminal Evidence (1989) p 216.

In addition, as we stated in the principles paper, it is preferable that the rules reflect actual practices so that parties and judges can know what to expect.[20] For these and similar reasons we expressed the view in our principles paper that the law requires fundamental reform.[21]

12 In summary, the rule against hearsay should operate to exclude evidence only where there are sound policy reasons for so doing. The rule in its present form fails to achieve that objective. Moreover, the law relating to hearsay is confusing, technical and artificial. There is a need for reform in order to promote clarity, simplicity and accessibility. The purpose of this discussion paper is to consider what options for reform would best ensure that result.[22]

20 Principles paper, para 76.

21 Principles paper, para 77.

22 It should be noted this paper does not deal with the topic of confessions which, although conceptually within the "hearsay" category, raise quite different issues.

III

The definition of hearsay in a code

13 In the previous chapter we noted some of the problems involved in defining hearsay. If, however, any form of the rule is to be retained in the code it is necessary to provide a definition. That in itself is a matter of difficulty. In the first place, should a statutory formulation include the rule against narrative as under the present law?[23] The principled approach would seem to be to adopt a narrower definition of "hearsay". Indeed, the problem with earlier statements of testifying witnesses is not the inability to cross-examine (since the declarant is present), but rather the danger of fabrication or unnecessary repetition. The word "hearsay" is also inadequate to capture testimony which, rather than repeating what the witness heard another say, merely recounts the witness's earlier statements. These considerations suggest that the rule against narrative is not sufficiently connected with the rule against hearsay to be included in a statutory formulation of the hearsay rule.

14 Few of the modern evidence codes and draft codes have taken this view. The United States Federal Rules of Evidence, for instance, treat an earlier statement of a testifying witness as non-hearsay only where it is inconsistent with the present testimony and given under oath at an earlier hearing or in depositions, or else is consistent with the present testimony and offered to rebut a charge of recent fabrication or improper influence or motive.[24] The Australian Law Reform Commission draft Act treats earlier statements of testifying witnesses as hearsay, although a broad exception is created

> if, at the time when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.[25]

The Canadian Law Reform Commission draft code, however, excludes from the hearsay rule all statements previously made by a testifying witness.[26] The Canadian draft does not contain a separate rule against narrative - leaving particular problems of earlier statements to be dealt with under the general provision relating to the exclusion of evidence which is unfairly prejudicial, misleading, confusing or time-wasting.[27] We consider this approach is

23 Para 4.

24 Rule 801(d).

25 Section 57(3) (civil proceedings) and 59(1) (criminal proceedings).

26 Section 28 draft code.

27 Section 5 draft code.

preferable to a more rigid exclusion of previous statements of testifying witnesses. Such statements may often be of value, for instance to supply facts which the witness has since forgotten (or remembered wrongly). Details, such as whether the previous statement should be introduced before or at the conclusion of the witness's evidence-in-chief, can be dealt with as a matter of court practice.[28]

15 A second issue which arises in relation to a statutory formulation of the hearsay rule concerns the definition of a "statement". An approach which is consistent with the policy of the rule might extend to implied and unintended statements on the basis that at least some of the dangers against which the hearsay rule guards are present for this kind of evidence.[29] For instance, can we more readily believe a boat's seaworthiness from the fact of the captain stepping into it than from the captain's statement that it is seaworthy? Is there any less doubt that a person is mentally competent when an (honest) acquaintance says so rather than demonstrates a belief in this by writing to that person about business matters?

16 On the other hand, are the dangers really so serious for unintended statements - which are more inferences than statements or assertions - that they need to be covered by the hearsay rule? (They could still be excluded under the general provision relating to evidence which is unfairly prejudicial, misleading, confusing, or time wasting). The Federal Rules leave implied and unintended statements outside the hearsay rule by defining a statement (for the purpose of the rule) as:

> (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.[30]

That definition does not appear to have led to practical difficulties[31] and we prefer the approach taken in the Federal Rules to the broader one suggested by some of the commentators.

QUESTION

Should "hearsay" be defined in the terms we have indicated?

28 Compare Evidence Amendment Act (No 2) 1980, s 4.

29 Para 6.

30 Rule 801(a); and see also s 27(1)(b) Canadian Law Reform Commission draft code and s 54(1) Australian Law Reform Commission draft code.

31 Park, "'I Didn't Tell Them Anything About You': Implied Assertions as Hearsay Under the Federal Rules of Evidence" (1990) 74 Minn LR 783.

IV

Effective abolition or rationalisation of the hearsay rule

17 Our hearsay options paper discussed a wide range of possibilities for reform of the hearsay rule, from piecemeal reform of the statutory exceptions through full codification of the rule (incorporating some element of reform as well) to outright abolition. Our conclusion was that piecemeal reform of the present law would not be adequate. That conclusion was substantially supported by the submissions and comments we received; and our survey of the law in chapter II of this paper adds weight to the argument for fundamental reform. Thus, in this chapter, we will focus on the broader options - in particular on abolition or a codified rationalisation of the rule.

18 In many ways abolition or effective abolition of the hearsay rule is an appealing option. This would have the advantage of directness and simplicity, since the need to distinguish between hearsay and other evidence would be largely avoided and it would not be necessary to frame exceptions to the rule to deal with those cases where evidence should not be excluded by its operation. All relevant evidence, unless excluded under some other provision of the code, would be able to be placed before the fact-finder. The crucial issue, however, is whether judges and juries can be relied upon to make a proper assessment of the dangers of hearsay evidence.

CIVIL PROCEEDINGS

19 Among those who responded to our hearsay options paper, there was support for abolition in civil cases. There the rule is already honoured more in the breach than in the observance. In a judge-alone civil case the judge, by reason of experience and training, should be able to assess the risks pertaining to hearsay evidence. There may be more debate concerning the ability of civil juries properly to assess hearsay evidence, but juries have shown themselves capable of mastering difficult tasks. It is questionable, too, whether a distinction should be made for the very few civil jury cases there are each year. Nor do the dangers presented by hearsay in civil cases appear to warrant a rule of exclusion. There is precedent for abolition in the Civil Evidence (Scotland) Act 1988 (largely following the recommendations of the Scottish Law Commission) which effectively abolishes the hearsay rule in civil proceedings, including those with jury, in Scotland.[32] Taking all factors into account, including the

32 Contrary to what was said in our hearsay options paper, para 78, there are still some civil jury trials in Scotland. Abolition with safeguards is also the preferred option of a number of other law reform bodies: see para 38

availability of the general exclusionary power and the procedural safeguards we discuss in Chapter VI, we have reached the conclusion that effective abolition is the best option for civil cases.

CRIMINAL PROCEEDINGS

20 Abolition is also a feasible option in criminal cases, where undoubtedly the hearsay rule has its greatest effect. Abolition would ensure that relevant and worthwhile evidence presently excluded by the hearsay rule is placed before the fact-finder, while at the same time avoiding the artificiality and complexity of the present law. It is an option which has been advocated by several eminent writers, including the current author of Cross on Evidence who has suggested:

> The best solution is to abolish the rule entirely, and leave the trier of fact to give the evidence what weight seems appropriate in the light of the comments of opposing counsel and the direction of the judge if a jury trial.[33]

We, too, think that in criminal cases the judge, and quite possibly the jury with the benefit of an appropriate direction, would be able to deal adequately with hearsay evidence by assessing the weight to be given to it.

21 There are, however, arguments for retaining some form of the rule in criminal cases. Some respondents to our hearsay options paper doubted that in criminal cases a jury would always be able properly to assess hearsay evidence. The rule also plays a role in protecting the accused's ability to confront and cross-examine, although the safeguards we later suggest would to a considerable extent protect the right to cross-examine (and maintenance of the rule must also be balanced against its adverse effect on the parties' ability to present relevant evidence). If the rule were abolished, the general exclusionary power concerning unfairly prejudicial, misleading and time consuming evidence would be the sole filter in relation to hearsay evidence. Whether that is an adequate basis for the exclusion of all unreliable hearsay in criminal cases is debatable. Finally, to our knowledge the hearsay rule remains applicable in some form in criminal cases in all other common law jurisdictions (including those which have abolished or are contemplating abolition of the rule in civil cases).

22 Though we have doubts about the strength of all the arguments against abolition in criminal cases, our present conclusion is that, in the interests of both the accused and the prosecution, it is preferable to retain some version of

33 Tapper, "Hillmon Rediscovered and Lord St Leonards Resurrected" (1990) 106 LQR 441, 468.

the rule. This in turn requires the imposition of a positive standard or standards for hearsay evidence. In criminal proceedings we accordingly favour rationalisation of the rule, coupled with procedural safeguards.

QUESTION

Should the hearsay rule be effectively abolished for civil proceedings? Should the hearsay rule be rationalised for criminal proceedings?

V

Rationalisation of the rule in criminal proceedings

23 Any rationalisation of the hearsay rule in criminal cases should proceed on the basic principle that logically relevant evidence is to be admissible unless there is good policy reason to exclude it. Consistent with that, reform of the law should aim to eliminate the present technical, confusing and inconsistent approach to the exceptions to the rule against hearsay. This necessitates a consideration of the principles upon which the exceptions to the rule are based.

THE PRINCIPLES WHICH UNDERLIE THE EXCEPTIONS

24 The two principles which underlie existing exceptions to the hearsay rule can broadly be classified as:

- necessity to admit the evidence if it is to be available to the court at all (primarily because the declarant is unavailable to testify, although some of the res gestae exceptions might come under this head as well);[34] and

- circumstantial assurances as to the reliability or trustworthiness of the particular category of evidence, which overcome the hearsay dangers.

Wigmore refers to these as the "necessity" principle and the principle of "circumstantial probability of trustworthiness".[35] For convenience we term them the necessity principle and the reliability principle. The question is how they should be reflected in the law.

THE NECESSITY PRINCIPLE

25 Under our present law the necessity principle is rarely in itself sufficient to ground an exception to the hearsay rule. Instead, it is generally linked with an exception based on reliability.[36] For instance, under the Evidence Amendment Act (No 2) 1980, evidence of a declarant

34 For instance, the exception relating to statements accompanying and explaining the event.

35 Wigmore on Evidence (3rd ed, 1940), vol 5, paras 1420-1422.

36 Some of the res gestae exceptions would seem to be based more on a necessity principle than on trustworthiness - although generally the evidence admitted under them also appears to be reliable.

who is deceased or otherwise "unavailable" will be admitted if it is first-hand documentary hearsay evidence or a business record, but is not generally admissible. The Federal Rules also specify categories of hearsay evidence which are admissible when the declarant is unavailable (and the categories are more limited than those when declarant availability is "immaterial").[37] The Canadian Law Reform Commission draft code, on the other hand, makes a general exception for hearsay evidence when the declarant is unavailable.[38]

26 We can see the argument in favour of admitting hearsay evidence which would not otherwise be accessible to the fact-finder. But in criminal cases we doubt whether hearsay which has no assurance of reliability should be admitted, when the very problem with hearsay is that it cannot be tested by cross-examination. Though we have accepted that situation for civil cases by endorsing the effective abolition option in all circumstances (including those where the maker is unavailable), the fact-finder in civil cases is generally a judge rather than a jury and the consideration of protecting the interests of the accused, in particular, is not present. In criminal cases, we prefer that there be some positive assurance of reliability before hearsay evidence can be admitted. Therefore we are reluctant to go as far as the Canadian proposal, which includes a broad exception for hearsay evidence when the declarant is unavailable.

27 On the other hand we do not consider that, in addition to a reliability requirement, hearsay should be excluded when a declarant is available. The safeguard of allowing available declarants to be called when another party so requires (discussed in chapter VI)[39] is an equally effective, and also a more flexible, way of achieving the same purpose.

THE RELIABILITY PRINCIPLE

An approach based on categories

28 It is clear that the reliability principle can be taken significantly further under the rationalisation option. One way to achieve this would be to enlarge the scope of the existing exceptions. For instance, the exception for business records could be extended to public

37 Rules 803 (24 categories where declarant availability immaterial) and 804 (five categories where declarant unavailable).

38 Section 29(1) draft code.

39 Paras 43ff.

records since these have much the same assurance of reliability; and the business records exception could be improved by the avoidance of technicalities and provision for new technology.[40] Hearsay statements in learned treatises also deserve some evidential status, since they have an assurance of reliability and many of them would also be judicially noted.[41] And adequate provision could be made for Maori custom and authorities, presently partially accommodated under the Evidence Amendment Act (No 2) 1980.[42] This approach would involve developing a list of categories of reliable hearsay to be included in the code.

29 It would also be necessary to have a general residual exception for evidence not covered by the categories but having assurances of reliability. Thus the United States Federal Rules contain residual exceptions.[43] These provide for the admissibility of statements which are

> not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness.[44]

Commentators indicate that the residual exceptions have worked well, albeit that a restrictive approach to their application has been adopted.[45]

30 Even, however, with the addition of a residual exception, we consider that an approach based on categories would be unduly restrictive. Categories frequently prove either over-inclusive or, more commonly, under-inclusive. As a result the courts often find themselves unable to confine the categories within their natural boundaries. They are either shrunk or stretched in particular cases to ensure that unreliable evidence is excluded and reliable evidence admitted, and there are frequently technical arguments about the scope of the categories.[46] These problems will continue even if the categories are framed

40 Para 8.

41 Para 10.

42 The Evidence Amendment Act (No 2) 1980, s 13, makes only limited provision for evidence of Maori custom.

43 Para 53.

44 Rules 803(24) and 804(b)(5).

45 Hochman, "The Residual Exceptions to the Hearsay Rule in the Federal Rules of Evidence: A Critical Examination" (1978) 31 Rutg LR 687.

46 Zuckerman, who advocates a similar approach to that which we recommend, also makes this point in The Principles of Criminal Evidence (1989) pp 216-217.

more broadly than at present. The same arguments will arise and there is no guarantee that they will be any more readily resolved. Furthermore, unless a residual exception is to become a common basis for the creation of new categories, it would be necessary to specify comprehensively all categories of hearsay which should be admissible. This is an exceptionally difficult task, which would also leave our law in a complex state, as is indicated by the fact that the Federal Rules have 29 categories. Even the Canadian draft code (which has the separate exception for evidence where the declarant is unavailable) has sixteen. The fact that, already, the res gestae and judicial notice doctrines have become vehicles for making large (and sometimes unprincipled) qualifications to the hearsay rule is a further indication that an approach based on categories of reliable hearsay evidence does not go far enough.[47] There are also indications that the courts are moving towards a broader and less technical approach to hearsay evidence.[48]

A reliability test

31 In criminal proceedings the best path in our view is to replace all the present hearsay exceptions (including res gestae) with a single broad exception for hearsay evidence which has reasonable assurance of reliability. There should also be the procedural safeguards which we mention in chapter VI. The objective is to enable the judge to assess the statement in the light of all its circumstances, and to determine whether it is sufficiently reliable to be admitted notwithstanding its hearsay nature. Such an approach has the advantage of enabling decisions on admissibility to be made directly on the basis of underlying principle. In essence, this takes the residual exception in the Federal Rules to its logical conclusion.

32 Although the above proposal might seem to be sweeping by comparison with an approach based on categories, it is significantly narrower than the effective abolition option. Moreover, it need not signal a complete departure from the present categories, some of which reflect valid judgments about the reliability of certain types of evidence. Flexible categories may well grow up around the exception and thus enhance predictability. But these should never develop into rigid and unwieldy rules, and there should always be scope for the admission of reliable evidence which does not fall into any common category. Thus the potential to distort the categories (and the resulting unpredictability) would be avoided.

33 The proposal is also consistent with the New Zealand Bill of Rights Act 1990 which provides that an accused has

47 Para 10.

48 Para 9.

the right "to present a defence".[49] In the United States the constitutional right of an accused to present evidence has been held to override the hearsay rule and allow the reception of reliable hearsay.[50] The same result could conceivably now occur in New Zealand if the hearsay rule prevented an accused from tendering reliable evidence. On the other hand, opponents of reform have expressed concerns about an accused having unlimited ability to tender hearsay. The balance between the right of the accused to tender evidence and any need to restrict inappropriate hearsay is, in our view, best dealt with by a rule which emphasises reliability as the basis for admission.

34 In some respects the proposed approach would be narrower than an approach based on categories. Instead of merely having to show that the hearsay is within a category which has been deemed generally to be reliable, our proposal requires a decision about the reliability of the particular evidence. The aim would be to ensure that, in every instance, only reasonably reliable evidence is admitted, not simply evidence which generally might be thought to be reliable. In some cases where the hearsay is contentious a detailed assessment of the circumstances relating to the particular statement will be required - such as its nature and contents, the circumstances in which it was made (including evidence from other witnesses that they heard the statement), and the credibility of the declarant (including any motive to manufacture evidence). Matters which will not, however, be relevant in relation to the admissibility of the statement are the credibility of the witness who relates the hearsay and the consistency of the statement with other evidence not directly related to the statement. Those matters should be canvassed before, and assessed by, the fact-finder.

35 The distinction between the circumstances relating to the statement and all the other evidence in the case is important for both logical and practical reasons. Logically, the general strength of the case does not affect the reliability of individual items of evidence. Indeed, if the distinction is not made, hearsay which the circumstances relating to the statement indicate to be reliable, may tend to be held inadmissible because other evidence is contradictory or neutral. From a practical point of view, drawing the distinction also enables the court to consider a reasonably limited set of circumstances when determining whether the statement should be admitted (although it will still be necessary on occasions for the judge to hold a voir dire). Moreover, limiting the relevant circumstances to those relating to the statement means that admissibility can be determined at the time the statement is offered in evidence.

49 Section 25(e).

50 Imwinkelried, "The Liberalisation of American Criminal Evidence Law - a possibility of convergence" (1990) Crim L R 790. See also art 43(e) of the International Covenant on Civil and Political Rights.

36 At present, either by consent or in terms of s 184 of the Summary Proceedings Act 1957, evidence in criminal proceedings can be produced in the form of a written statement rather than by calling a witness. Our proposal is not intended to provide a vehicle by which substantial parts of the evidence in a criminal case are dealt with by production of written statements. But it may form a useful adjunct to the provisions of s 184 when the circumstances of a statement are such as to provide reasonable assurance that it is reliable. Our proposal may also allow for developments in the use of videotaped evidence. For example, at present it is possible to introduce videotaped evidence when it meets the admissibility requirements for a confession, or where an order is made for examination of a witness prior to trial. Videotaped evidence of a child complainant can also be admitted in cases of a sexual nature. Under our proposal it may be possible to introduce the videotaped evidence of any young child (or indeed any witness). Such evidence could be videotaped at an early stage in proceedings while still fresh in the memory of the witness and could then be admissible, with the witness normally also being available for cross-examination. Broadly speaking, we consider that an evidence code should encourage the recording of evidence at a time when it is fresh in the memory of a witness.

CONCLUSION ON RATIONALISATION

37 In conclusion, we favour the option of rationalising the hearsay rule and its exceptions for criminal proceedings. Bearing in mind the problems with the way the present law has operated, we have emphasised the need to reform the rule radically so as to avoid technicalities and inconsistencies, to make the rule as simple and workable as possible and to reduce its ability to prevent worthwhile evidence coming before the judge or jury. Accordingly, the reform we propose both adopts a narrower definition of "hearsay" and rationalises the existing exceptions to the rule on the basis of a single principle: if the evidence has reasonable assurance of reliability it should be admitted notwithstanding its hearsay character. In our view this, together with the safeguards we next discuss (relating to the calling of available declarants and notice), will ensure that in criminal proceedings worthwhile evidence reaches the fact-finder, with the interests of the parties still being protected by the hearsay rule.

QUESTIONS

If the hearsay rule is rationalised for criminal proceedings, is a test based on reasonable assurance of reliability appropriate? What circumstances should be considered when the court is determining whether hearsay has a reasonable assurance of reliability?

VI

Safeguards

38 The Irish Law Reform Commission, which recently reported on abolition of the hearsay rule in civil proceedings, recommended a range of safeguards. Abolition with safeguards was also the preferred option in discussion papers issued by the Law Commission of England and Wales, the Scottish Law Commission and the Northern Ireland Law Reform Advisory Committee.[51] We consider that procedural safeguards are necessary in both civil and criminal cases. Possible safeguards are a judicial discretion to exclude evidence, a power to call available declarants, a power to call additional witnesses, a notification procedure, a best evidence requirement and weight guidelines.

JUDICIAL DISCRETION TO EXCLUDE EVIDENCE

39 A discretion to exclude evidence gives the court residual control over the admissibility of hearsay evidence. As long ago as 1917 Sir John Salmond, who was then New Zealand Solicitor-General, wrote:

> Let the court in its discretion exclude hearsay when it is in fact destitute of evidential value or where there is no sufficient reason why primary evidence should not be produced, or where its admission is otherwise unjustifiable or inexpedient; but in the very numerous cases in which such evidence is in fact and in justice unexceptionable, why should it be excluded by a rule of law?[52]

Recently the Irish Law Reform Commission has favoured the use of a judicial discretion to exclude hearsay evidence which is of insufficient probative value or which would

51 Law Reform Commission of Ireland, Report on the Rule Against Hearsay in Civil Cases (LRC 25-1988); Law Commission of England and Wales, The Hearsay Rule in Civil Proceedings (Consultation Paper No 117, 1990); Scottish Law Commission, Evidence: Report on Corroboration, Hearsay, and Related Matters in Civil Proceedings (Scot Law Com No 100, 1986); Law Reform Advisory Committee for Northern Ireland, Hearsay Evidence in Civil Proceedings (Discussion Paper No 1, 1990).

52 Salmond, Science of Legal Method: Select Essays by Various Authors, (1917), Introduction, p lxxix.

operate unfairly against a party.[53] The Scottish Law Commission also recommended a limited discretion which would allow the judge to exclude hearsay evidence in cases where "it is reasonable and practicable" for the declarant to be called as a witness.[54] However, in the end that discretion was not included in the Civil Evidence (Scotland) Act 1988, which simply gives a power to call additional witnesses.

40 The advantage of a broad judicial discretion to exclude hearsay is that the judge retains control over the admissibility of hearsay and can use this both to exclude unreliable evidence and to require that available declarants are called. The disadvantage, however, of a broadly framed discretion (such as a power to exclude evidence which would operate "unfairly") is that it may produce unpredictable results. As we have already indicated,[55] where the primary concern relates to the unreliability of hearsay evidence, we prefer in criminal cases to have a clear statement of the principle upon which hearsay is to be excluded, which should both aid consistency and enable appropriate appellate review; and in civil cases we recommend abolition of the rule, with the result that the reliability of hearsay will be for the fact-finder to determine.

41 Where, however, the primary concern relates to the desirability of calling available declarants, different considerations apply. Here the question is not so much whether the hearsay statement should be excluded, but rather whether the declarant should be required to testify. There are obvious reasons in both civil and criminal cases for creating an obligation to call available declarants if this is required by the opposite party. Parties would otherwise be able to avoid deficiencies or problems in the declarant's statement being exposed through cross-examination. The ability of opposing parties to present their case would be compromised and the best evidence would not be before the court. Some safeguard on the use of hearsay evidence where the declarant is available is therefore desirable.

42 We do not think, however, that the safeguard is best achieved by way of a wide exclusionary discretion. As we have said, this would carry some risk of unpredictability.

53 Law Reform Commission of Ireland, Report on the Rule Against Hearsay in Civil Cases, recommendation 3, p 21; see also s 18 Evidence Amendment Act (No 2) 1980.

54 Scottish Law Commission, Evidence: Report on Corroboration, Hearsay, and Related Matters in Civil Proceedings, recommendation 7, p 30.

55 Chapters IV and V.

Where the problem is the absence of the declarant, a power simply to require that available declarants be called to verify or supplement the hearsay statement (and be cross-examined) is in our view the direct and preferable solution.

CALLING AVAILABLE DECLARANTS

43 The Civil Evidence (Scotland) Act 1988 confers a power to call additional witnesses. Specifically, s 4(1) states that:

> For the purpose of section 2 or 3 above [providing for the admissibility of hearsay evidence], any person may at the proof, with leave of the court, at any time before the commencement of closing submissions -
>
> (a) be recalled as a witness whether or not he has been present in court since giving evidence initially; or
>
> (b) be called as an additional witness whether or not he has been present in court during the proof (or during any part of the proceedings).

The provision is a useful model for both civil and criminal cases. However, some issues require consideration (and the provision has not yet had sufficient time to be tested in practice).

44 The first issue is that it is unclear whose witness the declarant would be. If the witness-declarant is called by the party who asked for his or her presence, that party's ability to cross-examine is restricted (unless the witness is declared hostile). We think it would be preferable to require such witnesses to be called by the party adducing the hearsay statement, who would then be able to examine the declarant orally, as well as, or in substitution for, relying on the hearsay statement as evidence-in-chief. If the declarant refused to cooperate with the party calling him or her, the declarant could be treated as hostile and the party could be permitted to cross-examine. There would also need to be some sanction for refusal to call an available declarant (since it may not always be in a party's interests to do so). The most obvious sanction is the exclusion of the hearsay statement.

45 The second issue concerns the extent of the safeguard. This will depend on the breadth of the definition of "available". The Scottish Act obviates the need for a definition by giving the judge an apparently unfettered discretion to determine whether a witness should be called. An alternative approach, which we favour

because, again, we consider it would be conducive of greater certainty, is to specify the circumstances in which a declarant can be regarded as unavailable.[56] It should also be specified that the accused cannot be called unless the hearsay statement was tendered on his or her behalf; and there should be a residual discretion for the judge to excuse a party from calling an available declarant - if only to avoid the potential for abuse of the safeguard (insisting that a declarant be called who is very unlikely to add anything to the hearsay statement).

CALLING ADDITIONAL WITNESSES

46 In addition to the power to require available declarants to be called, we would favour a separate provision enabling a party to make an application to call further witnesses or recall earlier witnesses. This would simply make explicit the court's inherent power to permit further witnesses to be called. In this respect the Scottish provision is apposite, since in the case of an application to call a witness other than a declarant it is desirable for the court to have a discretion. The circumstances will vary from case to case and there should be no right to insist that a witness be called. Also, a witness should be called by the party who asked for his or her presence.

NOTIFICATION

47 It is important that parties to litigation should have the opportunity to investigate significant hearsay evidence before the matter comes to trial. However, in cases where there has been no advance disclosure of evidence the parties will not be able to foresee whether a witness will give hearsay evidence. The trial may then need to be adjourned to enable an opposing party to ascertain whether the declarant is available. It may also take time to secure the presence of an available declarant in court, and it may take time to locate other witnesses whom a party may wish to call either to rebut or support the declarant's testimony. In order to avoid adjournments and delays, a notification procedure may be worthwhile.

48 A notification procedure when a party intends to tender a hearsay statement was proposed by the Scottish Law Commission,[57] but was not adopted in the Scottish Act. The reason the proposal was not accepted was apparently the practical difficulties thought to be involved in giving notification. There is a notification procedure in the

56 Compare s 2(2) Evidence Amendment Act (No 2) 1980, although, as we indicated in our hearsay options paper, para 42, this does not go far enough.

57 Note 54, recommendations 11(b), 12-15, pp 30-31.

English Civil Evidence Act 1968 (enabling the notifying party to take advantage of a broad exception for first-hand hearsay),[58] but experience has been that this is rarely used, both because parties are not ready to notify within the specified time and because of the complicated nature of the procedure.[59]

49 The Scottish Law Commission recommended an optional notification procedure, to be used only where the evidence was likely to be particularly important. But an optional procedure, by itself, would not ensure notification. A party seeking to adduce hearsay evidence might prefer not to notify so as to minimise the risk of the declarant being called. The incentive for notification which the Scottish Law Commission proposed was that, if the other party was notified and did not object to the hearsay evidence, the discretion of the court to exclude the hearsay would not apply. If the safeguard is a power to require available declarants to be called rather than a judicial discretion to exclude the evidence, there would be a similar incentive (that is, in the event of notification and no objection the power to require available declarants to testify would not apply). But it is questionable whether this would be adequate to ensure notification. For reasons which we next discuss we have reached the conclusion that in criminal but not civil proceedings, a notification requirement should be framed in mandatory terms.

Notification in criminal proceedings

50 Notification of significant hearsay evidence may be particularly desirable in criminal proceedings before a jury, since it is impracticable for such proceedings to be adjourned while the availability of declarants is investigated. Even, however, in summary criminal proceedings there may be difficulty in obtaining an adjournment which does not require the whole case to be started again. And in criminal cases a costs sanction for failure to give notice will be ineffective because many accused people do not have the ability to pay costs (or are legally aided). These considerations, in our view, outweigh any negative features of a notification procedure as far as criminal proceedings are concerned.

51 We also consider the practical problems of a notification procedure in criminal cases should not be overestimated. In indictable cases all the prosecution evidence is disclosed by way of depositions; and in summary cases the defence can require disclosure in terms of the decision in Commissioner of Police v Ombudsman [1988] 1 NZLR 385. We have also made recommendations as to how a

58 Section 8(3)(a).

59 Law Commission of England and Wales, The Hearsay Rule in Civil Proceedings (Consultation Paper 1990) paras 3.50-3.55.

statutory disclosure regime might be put in place: see report on Criminal Procedure: Part One - Disclosure and Committal.[60] It would not add much to require the prosecution to include in its disclosure any information necessary to satisfy a notice requirement in relation to significant hearsay evidence. The position of an accused is different in that at present he or she need only disclose an alibi defence (in indictable cases). However, we think that the relatively simple notice requirement which we suggest in our draft code provisions would not be difficult for an accused to comply with, and any extra burden on the accused would generally be compensated by the ability to lead the hearsay evidence. Some flexibility should also be built into a notification procedure. For example, an accused who gives notice of an intention to offer hearsay evidence should not be treated as having elected to call evidence. If the accused subsequently decides not to offer the evidence, no comment should be able to be made.

52 The fact that a notice procedure can work if framed in flexible terms is indicated by the experience under the Federal Rules (which apply to criminal as well as civil cases). As we previously noted, the Federal Rules provide residual hearsay exceptions for evidence with "equivalent circumstantial guarantees of trustworthiness".[61] The residual exceptions also state that:

> However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and particulars of it, including the name and address of the declarant.

The absence of specific time limits or technical requirements for notice are indications of the flexibility of the provision. The courts have also adopted a pragmatic approach to its application, being prepared to treat the notice requirement as waived if the other party does not object.[62] In our view, the provision in the Federal Rules and the experience of its operation provide a useful precedent for a notice procedure for criminal cases. We also consider there should be exceptions to the obligation to notify in cases where other parties are not seriously prejudiced by a failure to do so (for instance, where the evidence is not of great significance) or where notice was impracticable.

53 It is also worth providing for cases where the judge considers that the failure to notify can be dealt with as a

60 NZLC R14 1990.

61 Rules 803 and 804(b); see note 37.

62 Hochman, "The Residual Exceptions to the Hearsay Rule in the Federal Rules of Evidence: A Critical Examination" (1978) 31 Rutg LR 687, pp 716-717.

matter going to the weight of the evidence rather than its exclusion (a less extreme sanction). This raises the broader question whether a formal notice procedure could be avoided altogether by empowering the judge to treat a failure to give informal notice as a matter of weight - and to instruct a jury accordingly. However, while this approach is appealing in its simplicity, we consider, as previously indicated, that there should be something more specific if notification is to be ensured in those criminal cases where it is regarded as essential.

54 Where there is a notice procedure the other parties will be able to determine before the trial commences whether they wish the declarant to be called. We therefore consider they should be obliged to counter-notify the party offering the hearsay statement of their intention to require the declarant to be called. This enables the party offering the hearsay to prepare the case on the basis that the declarant will be called (for instance, determining whether still to use the hearsay statement, and what additional witnesses to call). A counter-notice procedure need not be unduly onerous if framed in flexible terms. The sanction for failing to counter-notify would be that the judge could accept an application to dispense with the calling of the declarant.

Notification in civil proceedings

55 Whether a formal notice (and counter-notice) procedure should be imposed in civil cases raises different issues. The Northern Ireland Law Reform Advisory Committee concluded that it is sufficient to leave notice in civil cases to the informal practice of the parties,[63] and that is our view as well. In civil litigation disclosure of each party's case by way of exchange of briefs of evidence or affidavits is now becoming increasingly common. That alone makes any hearsay notice requirement less important. In cases where there has been no exchange of evidence, considerations such as the conclusion which the judge might draw as to weight provide some incentive to notify informally. Moreover, in civil cases a costs sanction is effective. In instances where informal notification should have been given but was not, a case may occasionally have to be adjourned. A considerable incentive to notify is created if, in those cases where failure to notify compels an adjournment (or even abandonment and a new hearing in, say, a civil jury trial), the full costs of any adjournment or abandonment are imposed on the party offering the hearsay.

OTHER SAFEGUARDS

56 There are other possible safeguards. For instance, the Irish Law Reform Commission recommended that a hearsay

63 Law Reform Advisory Committee for Northern Ireland, Hearsay Evidence in Civil Proceedings, para 5.35.

statement must be proved by the best evidence available - normally by producing first-hand hearsay.[64] However, the Northern Ireland Law Reform Advisory Committee considered that the risks of second-hand hearsay being offered where better evidence is available are not sufficiently high to warrant a special provision.[65] We agree with that view. We also consider that any requirements about original documents are better placed in a general section in the code dealing with documents (since the issues do not arise only in connection with hearsay evidence).

57 The Scottish Law Commission considered whether to recommend a safeguard by way of guidelines concerning the weight to be attributed to hearsay evidence.[66] In the end, however, that was rejected as impracticable. The Australian Law Reform Commission, which recommended a limited reform of the hearsay rule, also doubted the value of statutory guidelines as to weight, suggesting that their effect might be to restrict unduly the factors a judge or jury might consider in assessing the evidence.[67] Moreover, in the case of documentary evidence, hearsay can be more reliable than the recollection of an oral witness. We, therefore, are inclined to agree with the views expressed by the Scottish and Australian Commissions. That does not, however, negate the importance of the fact-finder giving careful consideration to the weight to be attached to hearsay evidence; and directions from the judge on the issue will often be essential in a jury trial.

CONCLUSION ON SAFEGUARDS

58 In civil proceedings the need for safeguards results in effective rather than total abolition, since a basic hearsay rule (and a definition of hearsay) needs to be retained for the purpose of determining when a safeguard may come into operation. After considering a range of possible safeguards, our conclusion is that only two specific safeguards are necessary in civil proceedings: the power to require available declarants to be called and the ability to call further witnesses. In addition, the parties in a civil case can rely on the general power of the court to exclude the hearsay evidence on the grounds of unfair prejudice,

64 Law Reform Commission of Ireland, Report on the Rule Against Hearsay in Civil Cases, recommendation 1(c), p 20.

65 Note 63, para 5.36.

66 Scottish Law Commission, Evidence: Report on Corroboration, Hearsay, and Related Matters in Civil Proceedings, para 3.38 and compare Evidence Amendment Act (No 2) 1980, s 17.

67 Australian Law Reform Commission, Evidence (Report No 26, Interim, 1985), para 714.

misleading or confusing effect or time-wasting. Although use of this power is not likely to be frequent, it should, along with the costs sanction, be effective to prevent any unnecessary protraction of hearings as a result of the use of hearsay evidence. The costs sanction will also ensure the development of informal notice procedures in cases where a party decides to offer important hearsay evidence. The assessment of hearsay evidence in civil cases will be a matter of weight, with a direction to the jury normally being required in those few cases where a jury is used.

59 In criminal cases, where we have concluded that the hearsay rule should be rationalised rather than abolished, the rule will prevent the introduction of hearsay which does not have a reasonable assurance of reliability. Nevertheless, the two safeguards concerning the power to require available declarants to be called and the ability to call further witnesses remain necessary. In addition, the costs sanction will not be effective to ensure that parties have advance notice of an intention to offer important hearsay. Though in many instances disclosure procedures will provide notice of an intention to offer hearsay, it is impracticable, in those cases where no notice has been given, for the proceedings to be adjourned while the availability of declarants is investigated. We have therefore concluded that in criminal proceedings a formal notice procedure is required.

QUESTION

What safeguards should apply to the reception of hearsay in civil and criminal proceedings?

VII

Other issues

THE HEARSAY RULE AND TE AO MAORI

60 The hearsay rule has always posed problems for the reception of evidence of Maori custom. Such evidence is usually of an oral nature and, as the law at present stands, is technically inadmissible as hearsay unless it falls within one of the common law or statutory exceptions.[68] In our view, the proposals we make for the admission of hearsay evidence in both civil and criminal cases will eliminate the current problems concerning evidence of Maori custom. Our proposal should also make it easier for the law to take proper account of reliable oral sources. In civil cases the maker of a hearsay statement concerning, for example, a Maori custom will normally be unavailable and the evidence will be admissible (subject to the general exclusionary power), with the court then making an appropriate assessment of the weight to be given to the evidence. In criminal cases the evidence will be admissible if the circumstances relating to the statement provide reasonable assurance that it is reliable which may well be so in the case of evidence from a recipient of a long standing oral tradition. Once again the weight to be given to the evidence will be for the fact-finder to assess.

DRAFT CODE SECTIONS

61 Draft code provisions for the early sections of a code and for hearsay evidence conclude this paper. For the convenience of readers we also include the draft early sections of the code from our codification paper.

68 Such as s 13 of the Evidence Amendment Act (No 2) 1980.

Early Sections for an Evidence Code

PART 1
PURPOSES

Purposes

1 The purposes of this Code are to:

(a) promote the rational ascertainment of facts in proceedings; and

(b) help promote fairness to parties and witnesses in proceedings and to all persons concerned in the investigation of criminal offences; and

(c) help secure rights of confidentiality and other important public and social interests; and

(d) help promote the expeditious determination of proceedings and the elimination of unjustifiable expense.

Compare Canadian draft Code s 1, Federal Rules of Evidence r 102

PART 2
GENERAL PRINCIPLES

Fundamental principle - relevant evidence is admissible

2 (1) All relevant evidence is admissible in proceedings except evidence that is excluded in accordance with this Code or any other Act.

(2) Evidence that is not relevant is not admissible in proceedings.

(3) Evidence is relevant for the purposes of this Code if it has a tendency to prove or disprove a fact that is of consequence to the determination of a proceeding.

Compare Canadian draft Code s 4(1) (above para 16), ALRC draft Act s 51

Compare Federal Rules of Evidence r 401, ALRC draft Act s 50

General exclusion

3 In any proceeding, the court shall exclude evidence if its probative value is outweighed by the danger that the evidence may:

(a) have an unfairly prejudicial effect; or
(b) confuse the issues; or
(c) mislead the court or jury; or
(d) result in unjustifiable consumption of time; or
(e) result in unjustifiable expense.

Compare Canadian draft Code s 5, Federal Rules of Evidence r 403, ALRC draft Act ss 117 and 118

PART 3
ADMISSIBILITY RULES

[The sections under this head will, to whatever extent is appropriate, cover all the current exclusionary rules, commencing with hearsay evidence]

Draft Hearsay Sections for an Evidence Code

PART 3
ADMISSIBILITY RULES

Division 1- Hearsay evidence

Definitions and interpretation

1 (1) In this Division

hearsay means a statement that

(a) was made by a person other than a person who is giving evidence of the statement at a proceeding; and
(b) is offered in evidence to prove the truth of the statement;

statement means

(a) a spoken or written assertion by a person of any matter; or
(b) non-verbal conduct of a person that is intended by that person as an assertion of any matter.

Compare Canadian draft Code s 27(2); Federal Rules of Evidence r 801; Californian Evidence Code r 1200

(2) For the purposes of this Division, the maker of a statement is unavailable as a witness if the maker

(a) is dead; or
(b) is outside New Zealand and it is not reasonably practicable to obtain his or her evidence; or
(c) is unfit to attend as a witness because of age or physical or mental condition; or
(d) cannot with reasonable diligence be identified or found; or
(e) cannot, after all reasonable steps to compel attendance have been taken, be compelled to attend; or
(f) cannot reasonably be expected to recollect the matters dealt with in the statement.

Compare Evidence Amendment Act (No 2) 1980 ss 2(2) and 3; Canadian draft Code s 29(2).

(3) Notwithstanding subsection (2), the maker of a statement shall not be regarded as unavailable as a witness if the unavailability was brought about by the party offering the statement for the purpose of preventing the maker of the statement from attending or giving evidence.

Compare Canadian draft Code s 29(3)

(4) For the purposes of sections 3(2)(b), 4(1)(a) and 4(2)(c), the "circumstances relating to the statement" include

(a) the nature and contents of the statement; and
(b) the circumstances in which the statement was made; and
(c) any circumstances that relate to the credibility of the maker of the statement.

Hearsay rule

2 Hearsay is not admissible in proceedings except as provided by this Code or by any other enactment.

Compare Canadian draft Code s 27(1)

Admissibility of hearsay in civil proceedings

3 (1) In a civil proceeding, section 2 does not have effect to exclude hearsay if the party offering the hearsay complies with subsection (2).

(2) A party to a civil proceeding who offers a statement that is hearsay must, if required by any other party to the proceeding, call as a witness the maker of the statement unless

(a) the maker of the statement is unavailable as a witness; or
(b) in the circumstances, including the circumstances relating to the statement, the court finds that the attendance of the maker of the statement need not be required.

Compare Civil Evidence (Scotland) Act 1988 s 4

Admissibility of hearsay in criminal proceedings

4 (1) In a criminal proceeding, section 2 does not have effect to exclude hearsay if

(a) the circumstances relating to the statement that is hearsay provide reasonable assurance that the statement is reliable; and
(b) the party offering the hearsay complies with such of the requirements of this section as apply in the particular case.

(2) A party to a criminal proceeding who offers a statement that is hearsay must, if required by any other party to the proceeding, call as a witness the maker of the statement unless

(a) the maker of the statement is unavailable as a witness; or
(b) the maker of the statement is an accused person, but this exception does not apply where an accused person offers a statement made by that person; or
(c) in the circumstances, including the circumstances relating to the statement, the court finds that the attendance of the maker of the statement need not be required.

(3) A party to a criminal proceeding who proposes to offer a statement that is hearsay must give notice in writing to every other party to the proceeding of the proposal to offer that statement unless

(a) the requirement to give notice is waived by all the other parties to the proceeding; or
(b) under subsection (5), the court dispenses with the requirement to give notice.

(4) A notice under subsection (3) must

(a) include the contents of the statement and the name and address (if known) of the maker of the statement; and
(b) be given sufficiently before the hearing to provide all the other parties to the proceeding with a fair opportunity to prepare to meet the statement.

(5) The court may dispense with the requirement to give notice under subsection (3) if

(a) having regard to the nature and contents of the statement, no party is substantially prejudiced by the failure to give notice; or
(b) giving notice was not reasonably practicable in the circumstances; or

(c) the failure to give notice can appropriately be dealt with as a matter of the weight to be attributed to the statement.

(6) A party to a criminal proceeding who is given notice under subsection (3) of a proposal to offer a statement that is hearsay must, if that party requires the maker of the statement to be called as a witness, give notice of that requirement, as soon as practicable, to the party proposing to offer the statement. The court may treat a failure to give notice under this subsection as a relevant circumstance for the purposes of subsection (2)(c).

Additional evidence where hearsay offered

5 If hearsay is offered in a proceeding, any party to the proceeding may, for the purpose of meeting that hearsay and with the leave of the court,

(a) recall any witness, whether or not that witness has been present in court since giving evidence; and
(b) call any additional witness, whether or not that witness has been present in court during the hearing.

Compare Civil Evidence (Scotland) Act 1988 s 4(1)

Hearsay in interlocutory proceeding

6 Section 2 does not have effect to exclude hearsay in an interlocutory proceeding if the party who offers it also offers evidence of its source.

Compare ALRC draft Act s 65; High Court Rules r 252

COMMENTARY

C1 The overall purpose of the hearsay provisions in the code is effectively to abolish the hearsay rule in civil proceedings and to rationalise the rule in criminal proceedings. In criminal proceedings hearsay evidence is admissible only when the circumstances relating to the statement provide reasonable assurance that it is reliable. In both civil and criminal proceedings there is a power to require an available declarant to be called and be cross-examined on the statement. Thus any right of confrontation is enforceable where its purposes are capable of being served.

Section 1

C2 Section 1 defines "hearsay", "statement", "unavailable", and "circumstances relating to the statement".

C3 In section 1(1), the definition of "hearsay" follows the common law in treating as "hearsay", statements "made by a person other than a person who is giving evidence...". An alternative formulation would be that hearsay is a statement "made by a person who is not giving evidence...".

C4 The definition of "hearsay" retains the common law requirement that the statement be offered to prove the truth of its contents. An alternative would be to make this requirement an element of the hearsay rule itself.

C5 The definition of "hearsay" excludes statements made previously by a witness who is now testifying. Although the common law treats these statements as "hearsay" (the rule against narrative), they are conceptually of a different nature from hearsay since they are not statements made by other persons (see paras 13 and 14 of the discussion paper, which suggest that use of previous statements of a testifying witness is best controlled under the general exclusionary power contained in s 3 of the draft early code provisions). In excluding previous statements by a testifying witness, the definition of hearsay is narrower than most statutory formulations.

C6 The definition of "statement" in section 1(1) is similar to that in the Federal Rules of Evidence , but may be narrower than the common law in being limited to assertions - that is spoken or written assertions or non-verbal conduct intended as an assertion. Inferences which may be regarded as "implied" hearsay under the common law are thus excluded; nothing is hearsay unless it is intended to be an assertion. The definition reflects the natural meaning of "statement" and provides a practical restriction on the kinds of statement which might conceivably be excluded as hearsay.

C7 The categories of "unavailability" listed in section 1(2) largely correspond to those contained in the various sections of the present Evidence Amendment Act (No 2) 1980 (section 1(2) being, however, applicable to both criminal and civil proceedings). The categories also effectively extend "unavailability" to cases of extreme youth as well as old age. There is a new category for cases where a maker of a statement simply refuses to testify.

C8 We have considered whether to include in addition to "mental condition" in s 1(2)(c) a specific reference to "emotional state" but decided this might be susceptible to too wide an interpretation. In our view, severe impairment of a maker's emotional state will make it necessary for the court to consider whether the maker is unfit to attend because of his or her mental condition. This may particularly be the case where the maker is a child (although, in sexual abuse cases, the provisions of the Evidence Amendment Act 1989 may still be retained).

C9 Section 1(3) covers the situation where a party offering hearsay induces the unavailability of the maker of a statement.

C10 Section 1(4) defines the "circumstances relating to the statement" for the purposes of ss 3(2)(b), 4(1)(a) and 4(2)(c). The circumstances include the nature and contents of the statement, the circumstances in which it was made, and the circumstances relating to the credibility of the maker of the statement. The last factor - circumstances relating to the credibility of the maker - may legitimately be used to raise issues concerning any motive to manufacture which the maker might have had (compare s 3(3) Evidence Amendment Act (No 2) 1980). For a fuller discussion of the issues see paras 34-35 of the discussion paper.

Section 2

C11 Section 2 sets out the hearsay rule for the purpose of the provisions which follow. The purpose is somewhat residual in the case of civil proceedings, in relation to which reference to the rule is only required in order to determine when the safeguard requiring the calling of an available maker of a statement applies. In criminal cases, however, the rule remains to the extent that the reliability exception does not apply - the rule is therefore retained in a substantive as well as a procedural sense. Section 2 states that hearsay is inadmissible except to the extent provided by the code or by any other enactment. The reference to any other enactment is included, at this stage, to ensure that the miscellaneous statutory hearsay exceptions based on reliability are not dispensed with - although it may not ultimately be necessary to retain, for example, all the statutory provisions relating to official records.

Section 3

C12 Section 3(1) provides that hearsay in civil proceedings is generally admissible unless excluded by some other provision of the code (for instance the power to exclude unduly prejudicial, misleading, confusing or time-wasting evidence). This follows the approach of the Civil Evidence (Scotland) Act 1988. However, there is a safeguard not included in the Scottish Act in that another party to the proceeding can require an available maker of a hearsay statement to be called by the party offering the statement. This applies unless the party offering the statement can demonstrate that the maker is unavailable in terms of s 1(2), or the court exempts the party from calling the maker under s 3(2)(b). In considering whether to exempt, the court may take into account not only issues relating to the maker's capacity to testify, but also circumstances relating to the reliability of the statement itself (see para C10 of the commentary). The fact that the hearsay statement is of minor importance may also be taken into account.

Section 4

C13 Section 4(1) sets out the conditions for the admissibility of hearsay evidence in criminal proceedings. Apart from the procedural safeguards, discussed below, there is the single substantive ground that the circumstances relating to the statement provide reasonable assurance that the statement is reliable. This ground goes further than the Evidence Amendment Act (No 2) 1980, or indeed that of other codes or draft codes by

- omitting any separate requirement of declarant unavailability (this being dealt with by the safeguard that available declarants be called if another party so requires),
- dispensing with the categories of hearsay evidence which are supposedly based on reliability and placing the focus directly on the reliability of the particular hearsay evidence, and
- avoiding the technical and detailed requirements which inevitably come with a categories approach.

For the purposes of s 4(1)(a), the definition in s 1(4) of the "circumstances relating to the statement" is important (see para C10 of the commentary).

C14 The main procedural safeguard is section 4(2). This is the corollary of s 3(2) and enables a party to require that an available maker be called as a witness by the party offering the hearsay statement. The "circumstances relating to the statement" set out in s 1(4) are again relevant.

C15 Section 4(2)(b) provides that a party cannot require an accused who is the maker of a hearsay statement to be

called unless the statement was offered by the accused. This is intended to deal, in particular, with the situation where one accused offers a hearsay statement by another accused. The accused who made the hearsay statement cannot then be required to be called.

C16 It should also be noted that a party who is required to call the maker of a hearsay statement has a choice. Either the hearsay statement may be offered and the maker called, or the offer of the hearsay statement may be abandoned and the maker alone called. If the first option is followed and the maker does not confirm (or fully confirm) the hearsay statement, the court will then determine what weight to give to the hearsay statement in the light of all the evidence.

C17 The requirement under ss 3(2) and 4(2) to call an available maker of a statement will apply when a witness offers a hearsay statement in cross-examination. In those circumstances the hearsay statement may be against the interests of the party who called the witness. That party is, however, obliged to call the maker of the statement who may, if appropriate, be treated as hostile. The party obliged to call the maker may also be granted leave under s 5 to recall an earlier witness and will in any event be able to call other witnesses if desired.

C18 Sections 4(3) and (4) supplement s 4(2) by setting out notice requirements for criminal proceedings. Essentially a party who intends to offer hearsay evidence must notify the other parties of that unless the requirement is waived by the other parties or the court dispenses with the requirement under s 4(5). The notice must be in writing and must include the contents of the statement and the name and address (if known) of the maker of the statement. Otherwise no specific form of notice is required. Thus the prosecution can comply when making disclosure under the ordinary rules. The defence will need to give a simple notice (see paras 50-54 of the discussion paper). Any notice must be given sufficiently in advance of the hearing to provide the other parties with an opportunity to prepare to meet the statement. In particular, the parties should have the opportunity to check the maker's availability, and the extent to which other oral testimony would supplement or contradict the hearsay statement.

C19 We anticipate that similar notice would voluntarily be given in relation to significant hearsay in civil proceedings, in order to avoid the costs sanction that would follow if the proceeding had to be adjourned (or even abandoned and recommenced) to give other parties sufficient time to consider and respond to the hearsay evidence.

C20 Section 4(5) gives the court the ability to ensure that the notification requirement is not applied rigidly. Notification may be dispensed with both where the court

considers that no party is substantially prejudiced by the failure to notify and where notice was not reasonably practicable in the circumstances (for instance, where a witness unexpectedly introduces hearsay). The court can also elect to treat a failure to notify as a matter going to weight rather than requiring exclusion of the hearsay statement under s 2. This might apply, for instance, where the evidence is not of major significance.

C21 Section 4(6) imposes an obligation on the recipient of a notice that hearsay evidence is to be offered, to counter-notify his or her intention to apply for the maker to be called. Again, the requirement is couched in flexible terms and the sanction is that the court may (but need not) take into account a failure to counter-notify in determining whether the maker needs to be called pursuant to s 4(2)(c).

Section 5

C22 Section 5 supplements the parties' right to require that available makers be called with a general right, subject to the court's discretion, to call additional witnesses or to recall witnesses to meet hearsay evidence. The provision is modelled on s 4(1) of the Scottish Civil Evidence Act. As distinct from the maker of a hearsay statement (who must, if required, be called by the party tendering the statement), an additional or recalled witness is called by the party who wishes to place the evidence of that witness before the court.

Section 6

C23 Section 6 excludes the application of the hearsay rule in interlocutory proceedings, for obvious practical reasons.

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