



**JUSTICE**

## **Criminal Justice Bill**

### **House of Lords**

**Briefing in support of Amendments  
proposed by Legal Action Group  
In relation to  
Part 11, Chapter 2  
on  
Hearsay evidence**

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## Introduction

1. JUSTICE is a British-based independent all party, legal human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists.
2. Part 11, Chapter 2 of the Criminal Justice Bill seeks to reform the law relating to the admissibility of hearsay evidence in criminal proceedings. The principal reform is the replacement of the old common law rule against the admission of hearsay evidence with a statutory framework providing that such evidence *will* be admissible provided certain safeguards are met.
3. JUSTICE and other groups are concerned that the current Bill does not adequately acknowledge the concerns about hearsay which the Law Commission identified in its 1997 Report.<sup>1</sup> The Legal Action Group (LAG) drafted suggested amendments to the Bill during its Commons Committee Stage which would ameliorate the various groups' concern and which JUSTICE also adopted. This briefing, prepared by Henrietta Hill, barrister of Doughty Street Chambers, provides further information on the hearsay rule to explain why we are concerned by the Bill's proposals, and addresses the amendments suggested by the Legal Action Group as a possible way of ameliorating those concerns. The clause numbers refer to the Bill as sent to the House of Lords.

## What is hearsay evidence?

4. The basic feature of hearsay evidence, namely evidence consisting of "an assertion other than one made by a person while giving oral evidence in the proceedings"<sup>2</sup> which is adduced as evidence of any fact or opinion asserted<sup>3</sup>, is that it is not given by the witness live. The common law has long recognised that such evidence is generally inadmissible in criminal proceedings, and that the primary means by which evidence should be received in a criminal trial is in person, before the jury or justices, with witnesses speaking from first-hand knowledge, not simply repeating what others have told them. In addition the hearsay rule means that records are in principle inadmissible evidence of the matters they contain, that where a witness gives oral evidence only the oral evidence counts, and that the previous statement by the witness generally does not.

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<sup>1</sup> Law Commission Report No. 245, *Evidence in Criminal Proceedings: Hearsay and Related Topics*, 1997, The Stationery Office

<sup>2</sup> *Cross v Tapper*, page 565

<sup>3</sup> The law has, however, always been that evidence is not hearsay when the purpose of adducing the evidence is to establish the fact that a statement was made, and not the truth of its contents – *Subramanian v Public Prosecutor* 1956 1 WLR 965, 970, per Mr. L.M.D. De Silva.

## Why can hearsay evidence be dangerous?

5. The main objection to hearsay evidence is that the defendant cannot challenge it. As long ago as 1790 Lord Kenyon observed that part of the rationale for the rule was that it was unfair to defendants to be precluded from challenging the evidence before them, saying:

'Examinations upon oath... are of no avail unless they are made in a cause or proceeding depending upon the parties to be affected by them, and where each has an opportunity of cross-examining the witness; otherwise it is *res inter alios acta*, and not to be received.'<sup>4</sup>

When the Law Commission examined the hearsay rule in 1997 it concluded that:

'...the *main*, if not the *sole*, reason why hearsay is inferior to non-hearsay is that it is not tested by cross-examination. This in itself may justify requiring the witness to attend where possible....'<sup>5</sup> [emphasis added].

Part of the reason for this concern is that in criminal trials, unlike their civil counterparts, the defendant's liberty is at stake and so there is a need for greater vigilance to protect his or her rights. Accordingly the burden of proof is higher and the approach to evidence is more stringent. Any future reforms must continue to maintain this vigilance and ensure that the rules on hearsay do not compromise the defendant's unqualified historical right to a fair trial.

6. The coming into force of the Human Rights Act 1998 on 2 October 2000 has placed an even higher premium on this objection to hearsay evidence, as Article 6(3)(d) of the European Convention on Human Rights incorporates the right of a criminal defendant "to examine or have examined" the witnesses against him as one of the elements of a fair hearing under Article 6(1). This requires that all the evidence must *in principle* be produced in the presence of the accused at a public hearing with a view to adversarial argument. While the calling of live evidence is not an absolute requirement, breaches of Article 6(3)(d) may occur if hearsay evidence is admitted other than in situations where there is a genuine impossibility of the evidence being tested; where the failure to put in place appropriate safeguards for the defence means that there is an inequality of arms

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<sup>4</sup> *R v Eriswell (Inhabitants)* 1790 3 T.R. 70

<sup>5</sup> para. 3.37

with the prosecution; or where hearsay evidence on all elements of the offence stands alone as the basis for a conviction.<sup>6</sup>

7. There are other historical objections to hearsay evidence which the Law Commission accepted in varying degrees – namely that hearsay is not “the best evidence”, that there is a greater danger that it may be concocted, that there are proportionately higher risks of distortion and concoction of multiple (second, third or fourth-hand) hearsay, that the jury is denied the opportunity to test the demeanour of the witness, that it may be given a probative force which it does not deserve and that the evidence is not given on oath.<sup>7</sup>

### **Are there any exceptions to the hearsay rule at present?**

8. Yes. The above objections aside, several limited exceptions to the common law rule against the admission of hearsay have been carved out in the common law and statute. These have provided for such things as the admission of business records in certain situations, the reading of statements when a witness is genuinely unavailable, and the admission of statements made by those who are dying (see, for example, sections 23 and 24 of the Criminal Justice Act 1988).

### **Is there a need for reform of the present law?**

9. Yes. The Law Commission at Part 4 of its Report explored whether there was a need to change the present law. The overwhelming majority of respondents who dealt with the issue, including JUSTICE, were in favour of reform. One of the main reasons for this is that the rule is one of the most complex and confusing of the exclusionary rules of evidence, meaning that practitioners and lay people find the principles very hard to understand.<sup>8</sup> We therefore welcome the opportunity presented by the Criminal Justice Bill to reform this complex area of law, on the basis that clarity in the criminal law is of benefit to both victims and defendants.

### **What did the Law Commission propose?**

10. The Law Commission considered various models which could be used to reform the law of hearsay, and concluded that its final option, namely categories of automatic exception

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<sup>6</sup> See, generally *Kostovski v. Netherlands* (1990) 12 EHRR 434 and *Van Mechelen and Others v. Netherlands* (1998) 25 EHRR 647.

<sup>7</sup> Law Commission, *op. cit.*, paras. 3.1 – 3.38

<sup>8</sup> There are many instances of members of the judiciary criticising the complexities of the law of hearsay, for example Lord Reid has said it is “difficult to make any general statement about the law of hearsay evidence which is entirely accurate” (*Myers v DPP* 1965 AC 1001, 1019 G to 1020 A).

plus a limited judicial discretion to admit evidence *where the justice of the case requires it* (a "safety-valve"), was the most appropriate. The safety-valve was intended to be very limited, to be used to admit what would otherwise be inadmissible hearsay, and not intended to be an open judicial discretion. It was also clearly intended that the "interests of justice" would be the driving force of this new narrow discretion.<sup>9</sup>

### **Did the Auld Review address the hearsay issue?**

11. Yes. Sir Robin Auld returned to the issue of hearsay at paragraphs 95 to 104 of his *Review of the Criminal Courts of England and Wales* (September 2001) and considered that the Law Commission had not gone far enough in its proposed relaxation of the rule. He therefore recommended that there be further consideration of the reform of the rule against hearsay, in particular with a view to making hearsay generally admissible subject to the principle of best evidence, rather than generally inadmissible subject to the specified exceptions as proposed by the Law Commission. In this respect, as with evidence in criminal cases generally, he sought a move away from rules of inadmissibility to "trusting fact finders to assess the weight of the evidence".
12. However, Sir Robin Auld's liberal approach has been criticised by groups such as LAG, Liberty, the Criminal Bar Association and the Bar Council. Concerns are that he was unduly influenced by one academic, Professor Spencer, who has a particular view of evidence (unlike the Law Commission's consultation process, which had been deliberately stretched so as to avoid inappropriate influence by one person); he did not cite any empirical research in support of its conclusion; he did not explain how his views on hearsay tallied with his general acceptance that evidence should be given live;<sup>10</sup> and it was felt that giving jurors and magistrates a large, unguided discretion to assess the weight of hearsay evidence may provide little comfort to a defendant convicted on the basis of it (especially as juries do not need to give reasons for their findings).

### **Why are we concerned about the scheme proposed by the Bill, and what are we recommending?**

13. JUSTICE and the Legal Action Group feel that the Government has 'ridden roughshod' over the concerns the Law Commission identified with hearsay evidence. The proposed

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<sup>9</sup> see paras. 6.48-6.53 and clause 9 of the draft Bill appended to the Law Commission Report

<sup>10</sup> in that he said he had '...seen no well-founded argument for a general move away from orality of evidence in criminal proceedings where there is an issue of the reliability or credibility of a witness' account on a material matter...' – paragraph 80

scheme in the Bill provides that three specific categories of hearsay will be automatically admissible, and that there is to be a final, broad power to admit any hearsay deemed "not" to be "contrary" to the interests of justice. We believe that the final power makes the earlier narrower discretions almost redundant and will result in vast quantities of previously inadmissible evidence being admissible. We also consider that the breadth of this power is such that, far from simplifying the law (something we all agree is necessary), will lead to even more uncertainty for lawyers and members of the public alike. It will not, we feel, reduce the amount of time spent on legal arguments relating to hearsay. Accordingly, our principal recommendation is that clause 107(1)(d), which gives this broad inclusionary power, be removed.

14. We are also concerned that the case has not been made out for *automatic* admissibility of certain types of evidence under clauses 107(1)(a)-(c). At present even if, for example, a witness is dead, unfit to give evidence or outside the United Kingdom, the court has at least some discretion as to whether the evidence should be admitted. We are concerned that the scheme proposed in the Bill does not incorporate any similar protection and could lead to hearsay evidence of low probative value being admissible, a waste of court time and in theory, miscarriages of justice. Accordingly, we recommend that a unified 'interests of justice' test applies to all forms of hearsay evidence and that this be achieved by inserting after clause 107(1) a new clause 107(1A), to provide:

**"A statement under subsection (1) may be admitted only if the court is satisfied that, having regard to sub-section (2), it would be in the interests of justice for it to be admitted"**

15. If the consolidated "interests of justice test" is not adopted, we recommend that clause 119(1)(b) (the court's general discretion to exclude evidence) be amended to make clear that the common law power for judges to exclude prosecution evidence where its prejudicial effect outweighs its probative value is retained (as the Explanatory Notes make clear is intended, albeit that the current wording of clause 119 does not reflect this).
16. Clause 107(2) gives the Court a list of factors to which it must have regard in deciding whether or not to admit the evidence under clause 107(1)(d) (which, if these amendments were adopted, would now be clause 107(1A)). Mindful of the fact that violations of Article 6(3)(d) of the European Convention on Human Rights can occur when convictions are based solely on hearsay evidence (see paragraph 5 above), we welcome that under clauses 107(2)(b) - (c) consideration is to be given to the significance that the hearsay evidence will have in the totality of the case. However we are concerned that there is no reference therein to the rights of the defendant, nor to the common law provision which

has always permitted the exclusion of evidence the prejudicial effect of which is outweighed by its probative value.

17. We therefore propose replacing the current **clauses 107(h)-(i)** (and clause 109(4)(b)) with the following as relevant factors:

**"(h) Any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement if the relevant person does not give oral evidence);**

**(i) Any other relevant circumstances"**

We consider that these amendments will make clear and express the need for the court to take into account the difficulty of challenging the statement if the person who made it is not present in court; and provide a residual discretion to ensure that any other relevant circumstances, not listed in sub clauses (a) to (h), could be taken into account. At present the wording we propose for insertion at clause 107(h) is present in clause 109(4) (as judicial leave is currently only retained in relation to hearsay evidence from witnesses who are absent through fear) and so we suggest consequential amendments to clause 109(4), so that it would read:

**"In appropriate cases, leave may be given under subsection (2)(e) having regard to the fact that a direction under section 19 of the Youth Justice and Criminal Evidence Act 1999 (c 23)(special measures for the giving of evidence by fearful witnesses etc) could be made in relation to the relevant person"**

18. Clause 108(2) provides that a statement can include a "representation of fact or *opinion*". However, opinion evidence is not generally admissible unless it is given by an expert on the basis of his/her professional expertise and we think it necessary to make clear that clause 108(2) is not intended to depart from that general rule. Accordingly we propose inserting a new clause 108(4) to the effect that:

**"A statement of opinion is only admissible if the opinion would have been admissible as oral evidence in the proceedings"**

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On behalf of  
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