

CRIMINAL JUSTICE ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 11 - Evidence

Chapter 2: Hearsay evidence

Section 114: Admissibility of hearsay evidence

395. *Subsections (1)-(3)* set out the circumstances in which a statement which is not made in oral evidence during criminal proceedings can be used as evidence of the facts stated within it. For example, if B was charged with robbery of a jewellers, the prosecution might want A to testify that B told her that he was “outside the jewellers at midday on Monday” in order to prove that B was outside the jewellers at the relevant time. As these subsections remove the common law rule against the admission of such hearsay evidence, this out-of court statement will be admissible in A’s testimony, *provided* it comes under one of the following heads:

- It is admissible under a statutory provision;
- It is admissible under a common law rule preserved by this Chapter of Part 11 of the Act;
- The parties agree that it can go in; or
- The court gives leave to admit the statement.

396. Before the court can grant leave to admit such a statement (under the fourth head above and found in *subsection (1)(d)*), it must be satisfied that it is in the interests of justice to admit the evidence. The intention, therefore, is that the court should be able to admit an out-of-court statement which does not fall within any of the other categories of admissibility, where it is cogent and reliable.

397. *Subsection (2)* sets out some of the factors that the court must consider when deciding whether to grant leave under the discretion in *Subsection (1)(d)*. Some of these factors are:

- the degree of relevance of the statement in proving a matter in issue in the trial (assuming the statement to be true);
- the circumstances in which it was made (if indeed it was made at all);
- the extent to which it supplies evidence which would not otherwise be available;
- the creditworthiness of the maker of the statement;
- the reason why oral evidence cannot be given;
- the extent to which the other party can challenge the statement, and the risk of unfairness.

398. The list is intended to focus attention on whether the circumstances surrounding the making of the out of court statement indicate that it can be treated as reliable enough to admit it as evidence, despite the fact that it will not be subject to cross-examination.
399. *Subsection (3)* provides that out of court statements may still be excluded even if they fulfil the requirements in this Chapter. For example, confessions must meet the additional requirements of sections 76 and 78 of the Police and Criminal Evidence Act 1984 before admission.

Section 115: Statements and matters stated

400. This section defines the type of statements which will be covered by Chapter 2. Its purpose is to overturn the ruling in *Kearley* [1992] 2 AC 228 that "implied assertions" are covered by the hearsay rule and therefore prima facie inadmissible. Under *subsection (3)*, a statement is one to which this Chapter applies if it is the purpose of the person making the statement to:
- cause the hearer to believe that the matter stated is true or to act on the basis that it is true; or
 - cause a machine to operate on the basis that the matter is as stated.
401. *Section 115* therefore changes the common law position and will *not* prevent the admission of such implied assertions on the basis of the hearsay rule. Equally, where the assertion relates to a failure to record an event, sometimes known as negative hearsay, it will not be covered by Chapter 2 if it was not the purpose of the person who failed to record the event to *cause* anyone to believe that the event did not occur.
402. *Subsection (2)* preserves the present position whereby statements which are not based on human input fall outside the ambit of the hearsay rule. Tapes, films or photographs which directly record the commission of an offence and documents produced by machines which automatically record a process or event or perform calculations will not therefore be covered by Chapter 2.

Section 116: Cases where a witness is unavailable

403. This section sets out a series of categories under which first-hand hearsay evidence, whether oral or documentary, will be admissible, provided that the witness is unavailable to testify for a specified reason. The new provisions will be available to the prosecution and the defence.
404. A statement will be admissible under this section (subject to the additional conditions explained below) if the person who made it is:
- Dead (*subsection (2)(a)*);
 - Ill (*subsection (2)(b)*);
 - Absent abroad (*subsection (2)(c)*);
 - Disappeared (*subsection (2)(d)*); or
 - In fear (*subsection (2)(e)*).
405. *Subsections (2)(e) and (4)* make specific provision for the admissibility, with leave of the court, of statements of witnesses who are too frightened to testify (or to continue testifying) provided the interests of justice do not dictate otherwise. In considering the interests of justice, the court should have regard to what was said in the statement; any risk of unfairness to other parties in the case; to the fact that special measures directions may be made in relation to a witness under Part II of the Youth Justice and Criminal Evidence Act 1999; and to any other relevant circumstances (*subsection (4)*). *Subsection (3)* provides that "fear" must be widely construed.

406. There are a number of other conditions which apply to the admissibility of evidence under *Section 116*. A statement can *only* be adduced as truth of any matter stated if:
- the witness's oral evidence would have been admissible itself (*subsection (1)(a)*); and
 - the person who made the statement is identified to the court's satisfaction (*subsection (1)(b)*). This will enable the opposing party to challenge the absent witness's credibility under *section 124*.
407. Additionally, even if all the relevant conditions mentioned above are satisfied, the evidence will not be allowed if a party, or someone acting on his behalf, *causes* the unavailability of the declarant (*subsection (5)*). This is intended to focus attention on cases where a party acts with the *intention* of preventing a witness from giving evidence. It is up to the party opposing admission to prove this to the court.

Section 117: Business and other documents

408. This Section provides for the admissibility of statements in documentary records provided certain conditions are met. These conditions are (*subsection (2)*):
- the document was created or received by a person in the course of a trade, business, profession or as the holder of a paid or unpaid office; and
 - the person who *supplied* the information in the statement had or may reasonably be supposed to have had personal knowledge of the matters dealt with in the statement; and
 - each person through whom the information was supplied received the information in the course of a trade, business, profession or other occupation or as the holder of a paid or unpaid office.
409. *Subsection (2)* therefore reflects the current position relating to business and other documents in section 24 (1)(c)(ii) and section 24(2) of the Criminal Justice Act 1988, which is being repealed. However, in the case of documents prepared for the purpose of criminal investigations or proceedings, the statement will only be admissible if the *supplier* of the information is unavailable or cannot reasonably be expected to recall any of the matters dealt with in the statement.
410. Even if a statement in a documentary record meets the conditions as set out in this Section, the evidence will not be allowed if it is considered unreliable. *Subsections (6) and (7)* permit the court to direct that the statement shall not be admissible where there is reason to doubt its reliability on the basis of its contents, source of information, mode of supply and circumstances of creation or reception.

Section 118: Preservation of common law categories of admissibility

411. This section preserves a number of common law exceptions to the old rule against the admission of hearsay evidence. The preservation of these rules means that in the specified circumstances, an out of court statement will be admissible as evidence of any matters stated in it. Many of these rules were also preserved under the corresponding civil evidence provisions in section 7 of the Civil Evidence Act 1995. The common law rules preserved in paragraphs (1) to (8) are as follows:
- 'Public information' will be admissible. This includes published works; public documents; records of certain courts, treaties, Crown grants, pardons and commissions; evidence relating to a person's age or date of birth;
 - 'Reputation as to character' will be admissible as evidence of a person's good or bad character;

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- ‘Reputation or family tradition’ will be admissible as evidence to prove or disprove pedigree or the existence of marriage; a public or general right; or the identity of a person or thing.
 - ‘Res gestae’ will be admissible (this rule is explained below);
 - ‘Confessions’ will be admissible as long as they fulfil the requirements of sections 76, 76A and 78 of the Police and Criminal Evidence Act 1984;
 - ‘Admissions by agents’ will be admissible against the defendant as evidence of any fact stated.
 - The rule of ‘common enterprise’ is preserved. This means that a statement made by a party to a common enterprise will be admissible against another party to the enterprise as evidence of any matter stated. For example, if it is independently proved that A and B are involved in a joint enterprise to rob a jewellers’, any incriminating statements made by A will also be admissible against B.
 - The rule of ‘expert evidence’ is preserved. This permits an expert to give evidence of any relevant matter which forms part of his professional expertise (although not acquired through personal experience) and to draw upon technical information widely used by members of the expert’s profession.
412. Paragraph (4) preserves the common law rule known as “*res gestae*”. One justification for this exception is that reported words which are very closely connected to a relevant event are reliable accounts and should therefore be admissible in certain circumstances. Such statement may be admitted if *one* of the following conditions is met:
- the statement is made by a person who was so emotionally overpowered by an event that the possibility that he was lying can be disregarded;
 - the statement accompanied an act which can properly be evaluated as evidence only if considered together with the statement. For example, if the act doesn’t make sense without the statement; or
- the statement relates to a physical sensation or mental state, such as an intention or emotion.

Section 119: Inconsistent statements.

413. This section clarifies the relationship between hearsay evidence and previous inconsistent statements. It provides that if a witness admits that he has made a previous inconsistent statement or it has been proved that he made such an inconsistent statement, it is *not only* evidence which undermines his ‘credibility’ (as someone who makes inconsistent statements) but it is also evidence of the *truth* of its contents.
414. *Subsection (2)* envisages the following type of situation. A makes a statement to the police that she saw B ‘outside the jewellers’ at midday on Monday’. A does not testify at trial but her statement is admitted under *Section 116*. As explained below, *Section 124* provides that evidence can be admitted in this type of situation in relation to the credibility of A. *Subsection (2)(c)* of *Section 124* provides that evidence can be admitted to prove that A had made another statement inconsistent with this statement (for example, A had said earlier that she did not see B on Monday at all). *Section 119(2)* provides that if there is such an inconsistent statement, it not only goes to the credibility of A, but it is also admissible as to the truth of its contents (that A did not see B on Monday).

Section 120: Other previous statements by witnesses

415. This section makes *other* previous statements admissible as evidence of the truth of their contents (not merely to bolster the credibility of the witness's oral evidence) in the following circumstances:
- *Subsection (2)* applies to statements which are admitted to rebut a suggestion that the witness's oral evidence is untrue;
 - *Subsection (3)* applies to the situation where a witness is "refreshing his memory" from a written document. If he is cross-examined on the document and it is received in evidence, the statement will be evidence of any matter contained within it;
 - *Subsections (4) - (7)* provide that a previous statement will be admissible as evidence of the facts contained within it provided the witness states that he made the statement and believes it to be true *and* one of the following conditions is met:
 - The statement describes or identifies a person, place or thing (which includes objects such as a car registration number) ; or
 - The statement was made when the incident was fresh in the witness's memory and he cannot reasonably be expected to remember the matters stated. The intention is that where a witness has to rely on another person, or a document, or both to fill in details which he or she can no longer remember, this fact should go to the *weight* of the evidence, but should not make it inadmissible; or
 - The statement consists of a complaint by a victim of the alleged offence which was made as soon as could reasonably be expected after the conduct in question, and the witness gives oral evidence in relation to the matter. There is a further requirement for such a statement to be admissible which is that the complaint must not have been made as a result of a threat or a promise.

Section 121: Additional requirement for admissibility of multiple hearsay

416. This section sets out the approach which the courts should take to multiple hearsay. "Multiple hearsay" is where information passes through more than one person before it is recorded.
417. Under the section a hearsay statement is admissible to prove the fact that another statement was made in three circumstances. These are:
- Either of the statements is admissible under sections 117 (business documents) 119 (inconsistent statements) or 120 (other previous statement of a witnesses);
 - All parties to the proceedings agree; or
 - The court uses its discretion to admit the statement.
418. The test for the court in deciding whether to exercise its discretion is whether it is satisfied that the value of the evidence in question, taking into account how reliable the statement appears to be, is so high that the interests of justice require the later statement to be admissible for that purpose. This discretion is intended to cover exceptional circumstances where although multiple hearsay does not fall within one of the specified categories for admissibility (in section 121 (1)(a) or (b)) it nevertheless should be admitted in the interests of justice.

Section 122: Documents produced as exhibits

419. This section provides that if a statement previously made by a witness is admitted in evidence and produced as an exhibit under *Sections 119 or 120*, the jury should not take the exhibit with them when they retire to the jury room, unless the court considers it appropriate or all the parties agree that it should accompany them.

Section 123: Capability to make statement

420. This section provides that an out of court statement cannot be admitted under *sections 116, 119 or 120* if the person who made the statement did not have the “required capability” for making a statement at the time the statement was made. A statement may not be admitted under *section 117* if any person who supplied or received the information or created or received the document did not have the “required capability” or, where that person cannot be identified, cannot reasonably be assumed to have had the required capability. Under *subsection (2)* a person is deemed to have the required capability for the purposes of this section if he can understand questions put to him and give answers which can be understood. This section reflects the test for witness competence to give evidence in criminal proceedings under section 53 of the Youth Justice and Criminal Evidence Act 1999.

Section 124: Credibility

421. This section makes provision for challenges to the credibility of the maker of a hearsay statement who does not give oral evidence in person in the proceedings. If such hearsay statement is admitted as evidence of a matter stated *section 124* provides certain rights for the person against whom hearsay evidence has been admitted to produce, in specified circumstances, evidence to discredit the maker of the statement or to show that he has contradicted himself. *Section 124* thus provides a replacement for the corresponding provisions in section 28(2) and paragraph 1 of Schedule 2 to the CJA 1988.

Section 125: Stopping the case where evidence is unconvincing

422. *Subsection (1)* imposes a duty on the court to stop a case and either direct the jury to acquit the defendant, or discharge the jury, if the case against him or her is based wholly or partly on an out of court statement which is so unconvincing that, considering its importance to the case, a conviction would be unsafe. This issue only arises in relation to jury trials (and by virtue of paragraph 4 of Schedule 7 to service courts) because in other cases, the finders of fact would be bound to dismiss a case in these circumstances, or order a retrial if appropriate.
423. Similarly, *subsection (2)* imposes a corresponding duty on the court to direct the jury to acquit of any other offence not charged, of which they could convict by way of an alternative to the offence charged, if the judge is satisfied that a conviction would be unsafe. *Subsection (3)* extends the duty to cases under the Criminal Procedure (Insanity) Act 1964 where a jury is required to determine whether a defendant, who is deemed unfit to plead, did the act (or made the omission) charged.

Section 126: Court's general discretion to exclude evidence

424. This section provides a further discretion to exclude superfluous out of court statements if the court is satisfied that the value of the evidence is substantially outweighed by the undue waste of time which its admission would cause. *Subsection (2)* preserves both the existing common law power for the court to exclude evidence where its prejudicial effect is out of proportion to its probative value and the discretion contained in section 78 of the Police and Criminal Evidence Act 1984 in relation to the admission of unfair evidence.

Section 127: Expert evidence: preparatory work

425. This section seeks to address the problem which arises where information relied upon by an expert witness is outside the personal experience of the expert (for example work undertaken by an assistant) and cannot be proved by other admissible evidence. The intention is that the rules about advance notice of expert evidence will be amended so as to require advance notice of the name of any person who has prepared information on which the expert has relied. It is envisaged that any other party to the proceedings will

be able to apply for a direction that any such person must give evidence in person but a direction will only be given if the court is satisfied that it is in the interests of justice.

426. In cases where no such application is made in respect of any assistant listed, or an application is made but refused, *section 127* will enable the expert witness to base his evidence on any information supplied by that assistant on matters of which that assistant had personal knowledge. *Section 127* applies if:
- The statement was prepared for the purpose of criminal proceedings;
 - The expert's assistant had or might reasonably be supposed to have had personal knowledge of the matters stated; and
 - A notice has been given under the advance notice rules of the name of a person who has prepared a statement on which it is proposed that the expert witness should base any opinion or inference, and the nature of the matters stated.
427. Where *section 127(1)* applies, the expert may base an opinion or inference on the statement and any information so relied upon will be admissible as evidence of its truth.
428. *Subsections (4) and (5)* permit a party to the proceedings to apply for an order that the exception should not apply in the interests of justice. In deciding whether to make such an order, the court may take into account any of the matters mentioned in *subsection (5)*.

Section 128: Confessions

429. This section inserts section 76A of the Police and Criminal Evidence Act 1984. The position prior to the insertion of this new section 76A was that whilst the prosecution could not make use of a confession which was obtained in breach of sections 76 or 78 of the Police and Criminal Evidence Act 1984, a co-defendant *could* use it to undermine another co-defendant's account or to strengthen their own case. Instead, section 76A applies the same rules to confessions adduced by the co-defendant to those adduced by the prosecution under sections 76 and 78 of PACE. That is, the confession will not be allowed if obtained by oppression or is rendered unreliable. 'Oppression' is defined in identical terms to section 76(8) of PACE.
430. Unlike the requirements for the prosecution, under section 76A(2), the co-accused would only need to satisfy the court on the *balance of probabilities* that the confession was not obtained by oppression or in circumstances likely to render it unreliable.
431. *Subsection (4)* maintains the rule that the exclusion of a confession does not affect the admissibility of facts discovered as a result of that confession.

Section 129: Representations other than by a person

432. This section provides where a statement generated by a machine is based on information implanted into the machine by a human, the output of the device will only be admissible where it is proved that the information was accurate. *Subsection (2)* preserves the common law presumption that a mechanical device has been properly set or calibrated.

Section 130: Depositions

433. This repeals paragraph 5(4) of Schedule 3 of the Crime and Disorder Act 1998 which provided that a judge could overrule an objection to a deposition being read as evidence if he considered it to be in the interests of justice to do so.

Section 131: Evidence at retrial

434. *Section 131* provides that if a retrial is ordered by the Court of Appeal, evidence must be given orally if it was given that way at the original trial except in certain defined situations, in which case a transcript of the earlier evidence may be used. These exceptions are:

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- All parties agree to the evidence being admitted;
- A witness is unavailable to give evidence in accordance with [section 116](#); or
- A witness is unavailable to give evidence for a reason other than those listed in [section 116](#) and his evidence is admitted under the residual discretion in [section 114\(1\)\(d\)](#).

Section 132: Rules of court

435. [Section 132](#) gives a power for making rules of court about the provisions in the Act. The intention is that rules of court will govern both the notice and leave procedures under Chapter 2. [Subsection \(5\)\(b\)](#) provides that the court or jury can, with leave, draw an adverse inference from the failure of a party to comply with the prescribed requirements.

Section 133: Proof of statements in documents

436. This section corresponds to the position under section 27 of the Criminal Justice Act 1988, whereby a statement in a document can be proved by producing either the original document or an authenticated copy. It is intended to cover all forms of copying including the use of imaging technology.

Sections 134-136 : Final provisions

437. [Section 135](#) introduces Schedule 7 which makes provision for Chapter 2 to apply to proceedings before courts-martial, Standing Civilian Courts and the Court-Martial Appeal Court, modifying them as necessary.

[Section 136](#) repeals existing legislation which is spent or is superseded by this Act.