Act. The certificate is evidence of the facts certified. In this, the legislation departs from British practice where, as in *Engelke v. Musman,*[13] it was held that Foreign Office statements with respect to diplomatic status of an individual, were to be accepted by the Court as conclusive. This departure from British practice may well have been made to enable a court to examine the question of whether or not a person claiming immunity was acting in the course of his employment—a problem wihch could well lead to considerable litigation.[14] Adoption of such a criterion as the fulcrum upon which many questions of immunity turn is a practical realisation of the functional theory of diplomatic immunity, and, while as a jurisprudential theory it appears the most acceptable rationalisation of diplomatic immunity and is thus to this extent a realistic approach to any problems which may arise, it could produce fine and difficult questions of definition and application.

V. G. McAULIFFE

EVIDENCE ACT AMENDMENT ACT 1967 (W.A.)

In 1898 the State of Massachusetts passed a statute providing that a declaration of a deceased person should not be inadmissible in evidence as hearsay or as a private conversation between husband and wife if the court found that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant. In 1938, the United Kingdom Parliament, apparently without knowledge of this earlier statute, passed its Evidence Act along the same lines, although limited to written statements. In 1967, some time after all the other Australian States had done so, Western Australia followed suit with the passing of the Evidence Act Amendment Act (No. 2) 1967. It must be conceded, however, that whereas the 1938 Act extended only to civil proceedings the Western Australian Act applies also to criminal proceedings. In this respect it is only two years behind the United Kingdom Criminal Evidence Act 1965, which has obviously served as its model.

---

13 [1928] A.C. 433.

14 Immunity for acts performed in the course of duty, as the criteria for immunity, is also used with respect to administrative and technical staff of a mission, private servants of members of a mission who are Australian citizens or persons ordinarily resident in Australia, and private servants of heads of missions who are not Australian citizens or ordinarily resident in Australia.

These statutes are usually discussed in the context of the hearsay rule; but they really go beyond this, for, as Cross observes,[1] when the maker of a statement who has knowledge of its truth is called as a witness the hearsay rule as it is usually formulated is not called in question. They create an exception to the rule that a previous inconsistent statement of a witness who is not a party does not constitute evidence of the facts stated, but merely goes to credibility. When the statement is consistent with the testimony of the witness, it is received as an exception to the rule prohibiting proof of the previous consistent statement of witnesses—in other words as an exception to the rule against self corroboration.

There can be no doubt that the time taken by this State to follow earlier legislation has enabled the legislature to avoid a number of the difficulties experienced elsewhere,[2] and our statute accordingly differs in a number of significant ways from its predecessors. Nevertheless it is a matter for some regret that the opportunity was not taken to tie together the rules relating to civil and to criminal proceedings. As they stand, these might as well have been contained in separate Acts, for there is a considerable amount of repetition, sometimes with annoying little variations which do not suggest any change in the intended meaning,[3] but in at least one case with a variation that offers scope for argument that a different meaning was intended.[4] Whether or not this was the intention is not clear. On other points there are quite fundamental differences in the rules which apply.

So far as civil proceedings are concerned, s. 79B of the Evidence Act contains definitions of "document", "statement" and "proceedings".

"Document" is defined to include books, maps, plans, drawings and photographs, and any device by means of which information is recorded or stored. Precisely the same definition is contained in section 79E(4) for the purpose of criminal proceedings. This definition is very wide in its scope, and would comprehend such things as tapes and records and probably computers, although its application to the latter seems fraught with difficulty. Does one, for example, produce the computer itself into court?

---

1 CROSS, EVIDENCE 484 (3rd ed.).

2 For a general discussion of some of the difficulties, see Campbell, *Recent and Suggested Reforms in the Law of Evidence,* (1967) 8 WEST. AUST. L. REV. 61.

3 Why, e.g., are the words "whether directly or indirectly" contained in brackets in s. 79E (1) (a) but not in s. 79C (1) (a) (ii)?

4 This problem arises out of the definition of "statement" in ss. 79B and 79E, and is discussed below.

"Statement" is defined to include any representation of fact or opinion whether made in words or otherwise. The word "opinion" is not to be found in the English Act or in the Victorian Act, and there has accordingly been some discussion in those places as to whether "a statement of fact" includes a statement of opinion. The better view is that it does—see *Warner v. Women's Hospital*[5] and *Morley v. National Insurance Co.*[6] This does not, of course, let in any opinion evidence which could not be given by a witness giving that evidence in court, because the section requires that oral evidence of that fact must be admissible as a condition for the admissibility of the document.[7]

For the purpose of criminal proceedings, the definition of "statement" in s. 79E(4) omits the reference to representations of opinion. The reason for this omission is not clear unless it be the result of too slavish a following of the words of the Criminal Evidence Act 1965 (U.K.). Granted that not very much opinion evidence could be brought in through the limited provisions relating to criminal proceedings, some such evidence surely could. Whilst, therefore, overcoming any conjecture so far as civil proceedings are concerned, the Act seems to have made the position far from clear in relation to criminal proceedings.

Section 79C provides that in any civil proceedings (which by definition include arbitrations and references) where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish the fact shall, on production of the document, be admissible as evidence of that fact if, first, the maker of the statement is called as a witness, and, secondly, if the maker of the statement either had personal knowledge of the matters dealt with by the statement or made the statement in the performance of a duty to record information supplied, whether directly or indirectly, by persons who had or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied.

The maker of the statement, who is normally required to be called as a witness, is either the person who has knowledge of the matters concerned[8] or the person who records the information from a person who has that knowledge.[9] In the second case, even if the person who

5 [1954] V.L.R. 410.
6 [1967] V.R. 566.
7 cf. CROSS, EVIDENCE 486 (3rd ed.).
8 s. 79C(1) (a) (i).
9 s. 79C(1) (a) (ii).

has the knowledge is available as a witness he need not be called. In any event, the requirement that the maker of the statement be called as a witness can be dispensed with if he is dead, or if he is unfit by reason of bodily or mental condition to attend, or if he is out of this State and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to identify or find him have been made without success, or where no party to the proceedings who would have the right to cross-examine him requires him to be called as a witness.

There are two significant distinctions between the Western Australian and the United Kingdom provisions. The record need not in this State be a "continuous" record, and the words "whether directly or indirectly" have been included in the description of the duty to record, which becomes a duty to record information supplied whether directly or indirectly by other persons.[10] No doubt these latter words have been used to remedy one flaw which became apparent in England. In *Barkway v. South Wales Transport Co. Ltd.*[11] the Court of Appeal held that evidence taken down in court at another hearing by a shorthand writer had not been supplied to him, and his notes were therefore not admissible. Asquith L.J. said:

> If a man dictates a letter giving information to the person to whom he is writing it is an abuse of language to say that he is engaged in "supplying information" to his shorthand-typist.[12]

One may wonder whether the addition of the words "directly or indirectly" would have caused that judge to alter this view. On the same ground, in *Brinkley v. Brinkley*[13] it was held that a justices' clerk's notes of evidence in a matrimonial cause were not admissible at a subsequent trial.

The court may at any stage of proceedings order that a statement be admitted in evidence, so that an application for this purpose can be made before the hearing.

The court is also given a very wide discretion as to the admission of these statements.[14] It may, for example, admit a statement notwithstanding that it is tendered by the party calling the maker of the statement. This means that it is theoretically open to counsel to call his witness, get him to identify his proof and then sit down, leaving

10 See s. 79C (1) of the W.A. Act and s. 1 (1) of the 1938 English Act.
11 [1949] 1 K.B. 54.
12 Id. at 60.
13 [1963] 1 All E.R. 493.
14 s. 79C (3).

the witness open for cross-examination. Undoubtedly, such a procedure would affect the weight of that evidence. Furthermore, the court has a discretion to admit a statement notwithstanding that its maker is available but is not called.

If the original document has been lost or mislaid or destroyed or is not produced the court may instead admit a copy.[15] This avoids the peculiar difficulty which arose in *Bowskill v. Dawson*[16] where Devlin J. declined to admit a copy of a document which was assumed to have been lost, because he took the view that the English Act assumed that the original must still be in existence and unable to be produced without unnecessary delay and expense before a copy could be accepted.

Section 79C(4), which is identical with s. 79E(2) relating to criminal proceedings, is a general clause, providing that for the purpose of deciding whether or not a statement is admissible as evidence, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained or from any other circumstances.[17] The court is also empowered to decide whether or not a person is fit to attend as a witness by acting on a certificate purporting to be the certificate of a registered medical practitioner. One may justifiably wonder what the distinction is between a "registered medical practitioner" in this subsection and the "fully registered medical practitioner" who must give the certificate under s. 79E(2).

Even if the requirements of the section are otherwise complied with, the court is given an absolute discretion by s. 79C(4) to reject a statement if it appears to be 'inexpedient in the interests of justice that the statement should be admitted'. This provision is not to be found in the English Evidence Act, so that in England, once the conditions of admissibility are met, the court has no discretion and must admit the statement.[18] The desirability of this discretion is not open to question. The Act has been drawn in wide terms, and the conferring of the discretion is the only way of ensuring that the Act is not used for purposes quite beyond those contemplated by the legislature.

The discretion to reject is, of course, quite separate from the question of the weight of evidence admitted. Although some have suggested

---

15 s. 79C(3)(c).

16 [1954] 1 Q.B. 288.

17 For an illustration of the inferences which might be drawn from a document, see Andrews v. Cordiner, [1947] K.B. 655.

18 See Ozzard-Low v. Ozzard-Low, [1953] P. 272, where the court declined to follow Infields Ltd. v. Rosen, [1939] 1 All E.R. 121, in which Simonds J. had considered that he did have a discretion to reject a statement.

that it was totally unnecessary to deal with it in the Act,[19] this aspect is dealt with in s. 79D, which is identical with the provision relating to criminal proceedings (s. 79E(3)). This provides that, in estimating the weight (if any) to be attached to a statement, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy of the statement, paying particular attention to contemporaneity and to the question of whether or not the maker of the statement had any incentive to conceal or misrepresent facts. It is curious that the concern here is solely with the incentive of the maker of the statement when, as already observed, in the case of records the recorder is the maker of the statement. Naturally, however, courts will have regard as well to the incentive of the suppliers of information to recorders under the more general provision in this subsection.

It was with some relief that it was noted that the local Act does not contain the English provision limiting admissibility to those cases where the maker of the statement has no "interest" in the matter. This provision had led to a great deal of litigation, and its abolition was recommended by the Committee on Supreme Court Practice and Procedure.

The final provision relating to civil proceedings is the somewhat obvious one that a statement rendered admissible under the Act is not to be treated as corroboration of evidence given by the maker of the statement.

Criminal proceedings are dealt with in s. 79E, following almost word for word the English Criminal Evidence Act 1965, a statute which was passed in a hurry after the decision in *Myers v. D.P.P.*[20] and which was designed to meet just the problem with which the case dealt. It seems to have been intended as a temporary expedient only, pending a more general overhaul of the subject. There are only two divergencies. The definition section, which comes at the end, varies slightly, and, unlike the English position, the Western Australian courts are given an absolute discretion as to the admission of documents in the same terms as the discretion given with respect to the admission of documents in civil proceedings.

The conditions for admissibility in criminal cases are somewhat different and far more restrictive than in civil cases. To be admissible, the document must be or form part of a record relating to a trade or

---

19 See, e.g., Nokes, discussing Bearman's Ltd. v. Metropolitan Police District Receiver, [1961] 1 W.L.R. 634, in (1961) 24 M.L.R. 493.

20 [1965] A.C. 1009.

business and be compiled, in the course of that trade or business, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supplied. A second requirement is that the person who supplied the information recorded in the statement in question is dead or beyond the seas or unfit by reason of his bodily or mental condition to attend as a witness or cannot with reasonable diligence be identified or found or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied. Here the emphasis is on the person who supplied the information and not, as in the case of civil proceedings on the recorder; but why, in the last case should not the person concerned be called as a witness to ascertain whether or not he does in fact have any recollection?

So far as the definition clause is concerned, it is interesting to note that a business is defined to include any public transport, public utility or similar undertaking carried on by the Crown or a statutory body and also includes any municipality. The form of definition is such that the admissibility of municipal undertakings but extends to all records. No doubt nice arguments will arise in the future as to whether particular occupations fall within the description of "trade or business".

It may, finally, be of interest to see how similar provisions have been used in practice, because it has elsewhere been observed that the profession has been slow to gain the maximum benefit from those provisions. Hospital records have been admitted without the necessity for calling the doctors who compiled them: *Reed v. Columbia Fur Dressers & Dyers Ltd.*[21] A record was admitted which had been made by a police officer in his notebook of the statement of an eye witness to an accident, the witness being a foreigner then temporarily resident in England but who had on his return home become untraceable: *Simpson v. Lever.*[22] Statements in a letter from a soldier's commanding officer as to the man being in a certain medical category and as to his capacity for work were admitted: *Baggs v. London Graving Dock Co. Ltd.*[23] A statement made to a police officer by a witness who

21 [1964] 3 All E.R. 945.
22 [1962] 3 All E.R. 870.
23 [1943] K.B. 291.

had since died was admitted: *Bullock v. Borrett.*[24] A letter was admitted which had been written by a woman living in Denmark who declined to come to court and of whose conduct with her husband a wife complained: *Galler v. Galler.*[25] A statement by a workman in making a claim for workers' compensation was admitted in a common law claim by his widow after his death: *Jarman v. Lambert & Cooke Contractors Ltd.*[26] A letter written by a testator and attached to his will which set out his dislike for his son-in-law was admitted in a case challenging the will: *re Thompson.*[27]

In *Harvey v. Smith-Wood*[28] an elderly man was called as a witness by the plaintiff, and he gave evidence conflicting with that of the plaintiff. The plaintiff's counsel was then permitted by Lawton J. to put to him a written statement made by him six years previously. Lawton J. expressed some regret at permitting this course of action which amounted to impeaching the credit of one's own witness, and he stated that counsel should hesitate to adopt this course except in very special circumstances. In point of fact, of course, under the English provisions, unlike the Western Australian ones, it would not seem that the judge had any discretion at all to bar the evidence once the conditions for its admissibility had been met. In spite of this, in an earlier case, *Cartwright v. W. Richardson & Co. Ltd.*,[29] where a prior inconsistent statement had been put to a witness in re-examination, Barry J. said:

> That does not seem to me to be a proper use of the provisions of the Evidence Act, 1938. Except in the case of an adverse witness I do not think that the fact that he made a previous contradictory statement is a fact which is admissible in evidence in re-examination.[30]

He accordingly excluded the statement. But in *Constantinou v. Frederick Motels Ltd.*[31] the approach of Barry J. to the Act was criticised by Lord Denning, in whose judgment the other members of the Court of Appeal agreed.

In *Hilton v. Lancashire Dynamo Nevelin Limited*[32] Megaw J. admitted a statement of a witness adduced at the outset of his examina-

---

24 [1939] 1 All E.R. 505.
25 [1955] 1 All E.R. 792.
26 [1951] 2 K.B. 937.
27 [1939] 1 All E.R. 681.
28 [1964] 2 Q.B. 171.
29 [1955] 1 All E.R. 742.
30 Id. at 743.
31 [1966] 1 W.L.R. 75.
32 [1964] 2 All E.R. 729.

tion in chief. The Judge conceded that the statement had to be admitted, but he indicated that he would not attach very much weight to it.

No doubt the provisions of the Amending Act will lead to the development of many ingenious arguments for the admission of documents, but certainly they will prove to be extremely beneficial. At the same time, one may wonder how long it will be before further incursions into the old hearsay rule are made. Strong arguments have already been brought forward in favour of the admission of verbal statements in similar circumstances to those in which documents can now be admitted, and indeed the time may not be too remote before the whole of the hearsay rule is abolished. Many of the reasons given for its existence no longer carry much weight. In particular, the absence of an oath has been treated with scorn, even by some judges. Why indeed should it be that courts are barred from acting on evidence on the basis of which in the comunity at large decisions are made having far reaching effects without any thought being given to the matter? May not the real problem be one of weight rather than admissibility where hearsay evidence is concerned?[33]

G. A. KENNEDY*

---

[33] See generally Campbell, loc. cit., n. 2 above.

* *Barrister and Solicitor of the Supreme Court of Western Australia.*