The Law
Reform
Commission

Discussion Paper No. 16

REFORM OF EVIDENCE LAW 1980

THIS PAPER IS NOT A COMMISSION REPORT. It contains details of the Commission's Program for the Evidence Reference. In addition a number of problem areas in the laws of evidence are raised for discussion and comment. The Paper also summarises an Issues Paper prepared by the Commission. Copies of the Issues Paper are available on request to persons and organisations willing to comment in detail on the issues raised in it. ANY VIEWS EXPRESSED IN THIS PAPER AND IN THE ISSUES PAPER DO NOT REPRESENT THE COMMISSION'S FINAL VIEWS. THEY ARE PUBLISHED TO RAISE ISSUES AND PROMOTE DISCUSSION. As far as possible comments should be related to specific paragraph numbers in the paper. All inquiries and comments should be directed to -

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All submissions should be received by 27 February 1981.

Commission reference: ALRC DP 16

Commissioner in Charge: Mr T.H. Smith

Notes on Terms

The following explanations may assist readers not familiar with some legal terms.

Burden of Proof — 'Burden of proof' refers to the obligation imposed on a party to establish a particular issue raised in legal proceedings. For example, in a murder trial, the Crown will have the obligation of establishing that the accused did the act which caused death and that he did so intentionally. On the other hand, if the accused wishes to argue that he was insane at the time the offence was committed, he will carry the obligation of establishing the fact. The Crown and the accused, respectively, have 'the burden of proof' in relation to these issues.

Common Law — The laws developed and explained by decisions of the courts.

Competence and Compellability — These descriptions are applied to witnesses. A competent witness is one who is permitted by law to give evidence in proceedings. A compellable witness is a competent witness who can be compelled to give evidence when unwilling to do so.

Corroboration — Where evidence is given in a trial by children, by victims of sexual assault, or by accomplices of the accused, the law requires corroboration. This is evidence of other witnesses which confirms or supports that of the child, victim or accomplice. Corroboration is also required in other situations — for example, in trials for treason or perjury.

Doctrine of Precedent — It requires a judicial officer to apply decisions of courts situated above him in the court structure of which he is a member.

Issue Estoppel — Prevents parties relitigating issues decided in an earlier case between them.

Hearsay Rule — This rule prevents a witness giving evidence of what he has heard others say. The rule applies, however, only where the purpose for giving the evidence is to prove the truth of the facts contained in such statements. It does not prevent evidence being given if the purpose is to establish that a statement was made — for example, the statement complained of in a defamation case.

Parol Evidence Rule — This rule prevents the parties to a written agreement, who intended that it should be the sole record of their agreement, presenting other evidence to the court in an attempt to alter, or add to, or contradict that written agreement.

Presumptions — Conclusions or inferences that are drawn by the court from known facts.

Probative — Evidence is probative of a fact when it tends to prove that fact.

Res Gestae — The doctrine of res gestae allows evidence to be led, amongst other things, of everything said and done in the course of the incident or transaction that is the subject of the trial.

Res Judicata — When a decision has been given in a case, the subject matter of that case cannot be raised again in a later case between the same parties.

View — The inspection by the court of the place where the events in question in the trial took place.

Terms of Reference

1. The Commonwealth Attorney-General has given the Law Reform Commission a Reference which requires it —

> TO REVIEW the laws of evidence applicable in proceedings in Federal Courts and the Courts of the Territories with a view to producing a wholly comprehensive law of evidence based on concepts appropriate to current conditions and anticipated requirements AND TO REPORT:
>
> (a) whether there should be uniformity, and if so to what extent, in the laws of evidence used in those Courts; and
>
> (b) the appropriate legislative means of reforming the laws of evidence and of allowing for future change in individual jurisdictions should this be necessary.
>
> IN MAKING ITS INQUIRY AND REPORT the Commission will have regard to its functions in accordance with sub-section 6(1) of the Act to consider proposals for uniformity between laws of the Territories and laws of the States.

2. The courts referred to in the Terms of Reference comprise:

- The High Court of Australia, the Federal Court of Australia, and the Family Court of Australia (the 'Federal Courts'); and
- The Supreme Courts and the Courts of Petty Sessions of the Australian Capital Territory, Norfolk Island, and Christmas Island, and Cocos (Keeling) Island (the 'Courts of the Territories').

The Federal Courts apply the laws of evidence of the State or Territory in which they happen to be sitting. This is the result of s.79 and s.80 of the Judiciary Act 1903.[1] Thus the review of the laws of evidence to be undertaken by the Commission involves a consideration of the laws of evidence of all States, the abovementioned Territories, and also the Northern Territory as applied in Federal Courts. The Terms of Reference do not require the Commission to consider the laws of evidence applied in State and Territory Courts exercising federal jurisdiction or to consider the laws of evidence in the context of tribunals.

3. The work of the Federal Courts and Territory Courts is wide-ranging.

- Although the High Court's trial work has been substantially reduced since the

1. *s.79* 'The laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all courts exercising federal jurisdiction in that State in all cases to which they are applicable'.

   s.80 'So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the statute law in force in the State in which the court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.'

Judiciary Amendment Act 1976, it still hears some cases involving the taking of evidence and the application of the laws of evidence.

- The Federal Court's trial jurisdiction is varied and covers both civil and criminal work in a wide range of matters including trade practices, bankruptcy, and industrial relations.
- In the Family Court the civil jurisdiction includes divorce proceedings, custody proceedings, and proceedings for maintenance and property distribution and injunctions. From time to time contempt proceedings (which are of a criminal nature) are brought against persons who are alleged to have failed to comply with orders of the Court.
- The Courts of the Territories — Supreme Courts and Courts of Petty Sessions are vested with jurisdictions which cover both civil and criminal matters of the widest variety.

The Commission's Program

4. ***Review.*** The Commission will first review the laws of evidence applicable in the courts referred to above. The present view is that the laws of evidence comprise those rules of law which directly or indirectly:

- control what factual material may be received by a court;
- control the manner in which this material is presented to the court;
- control how the material is to be considered once it is received by the court and what conclusions, if any, are to be drawn from particular classes of evidence;
- specify the degree of satisfaction that the judge, magistrate, or jury must attain before deciding whether a fact that is in issue in the proceedings is established and the consequences if such a level of satisfaction is not reached.

The review required by the terms of reference involves at least the following tasks:

(a) ***Comparison of Laws.*** The Commission has commenced to collect and compare the laws of evidence of the States and the Territories.

(b) ***Collecting Data.*** The Commission is seeking from the Federal Court and the Family Court and the Supreme Court of the Australian Capital Territory, detailed information about the extent and nature of the trial work handled by those courts, the States and Territories in which they sit, the transfer of proceedings in those courts from one State and Territory to another, and the use of jury trials and the standard of jurors.

(c) ***Psychological Assumptions.*** The Commission is examining the assumptions about human behaviour upon which many of the rules are based, wholly or partly.[2] On this aspect, the Commission seeks the assistance of psychologists and other interested persons.

(d) ***Ethnic Issues.*** The Commission proposes to consider whether the laws of evidence create special problems for members of migrant and

2. It is assumed that provided a person understands the nature of the oath, that person is competent to give evidence. It is assumed that evidence of the victim of a sexual assault tends to be unreliable because of the risk of concoction due to hysterical or vindictive motives. Statements made during the event in question in a trial, e.g. an assault, are assumed to be reliable because of their spontaneity. It is assumed that the stress of the event does not affect their reliability.

Aboriginal groups in our society.[3] It seeks their assistance on this question.

(e) ***Special Problems.*** The proposed review program includes an investigation of a number of problem areas:

- problems in the operation of s.79 and s.80 of the Judiciary Act 1903;
- practical problems created in the several Federal and Territory courts by the laws of evidence under which they operate;
- criticism of the laws of evidence generally;
- whether the present laws of evidence are adequate for present computer and communications technology and for present and likely future technological developments.

(f) ***Uniformity.*** Arguments for and against a uniform Commonwealth law of evidence for Federal and Territory courts also must be considered.

(g) ***Basic Issues.*** Finally, the Commission is considering the following issues:

- the definition of the proper subject matter of the 'laws of evidence'[4];
- the relationship between the laws of evidence and the nature and purposes of civil and criminal trials;
- the particular purposes which it may be said the laws of evidence serve and the extent to which they do so;
- the extent to which any particular purposes should be abandoned or modified;
- the purposes which should be served by the laws of evidence;
- the principles upon which any statutory statement or statements of the laws of evidence should be based.

An issues paper, discussing these matters, has been prepared by the Commission and is available from the Commission to those prepared to comment in detail upon it.

5. ***Next Stage: Future of Reference.*** On completion of this review the Commission will proceed to the second stage of the reference which will result in a report on:

- whether there should be uniformity in the laws of evidence applied in the relevant courts and if so to what extent; and
- the appropriate legislative means of reforming the laws of evidence and of allowing for future changes in original jurisdictions should this be necessary

The Commission notes that the Attorney-General and the Senate Standing Committee on Constitutional and Legal Affairs have spelt out as a preferred objective

3. e.g. *R.* v. *Anunga* (1976) 11 ALR 412 — the rules relating to confessions of Aboriginals.

4. Writers disagree on this topic. Some suggest that rules such as res judicata, issue estoppel, and the parol evidence rule, all of which would be included by the definition contained in the text, should not be included in the topic of the laws of evidence but placed in the category of procedural or substantive law. Compare J.B. Thayer whose view was that exclusionary rules were the only proper subject matter.

the production of a wholly comprehensive law of evidence for the Federal and Territory Courts.[5]

6. It is now proposed to refer in more detail to three topics referred to in paragraph 4 upon which comment is sought: Special Problems, Uniformity, Basic Issues.

Special Problems

Operation of the Judiciary Act 1903 in Federal Courts

7. ***Differences in Laws of Evidence — Is this Undesirable?*** Federal Courts apply the laws of evidence of the State or Territory in which they sit. The Commission has not yet completed the collection and comparison of the laws of evidence of the States and Territories referred to above. However, a comparison of evidence legislation has, even at this stage, produced many instances of rules which differ between the States and Territories. Some examples are:

- ***Competence and Compellability.*** Spouses, for example, would not be able to give evidence for the prosecution in the Federal Court sitting in South Australia and Tasmania and could not be compelled to give evidence for the prosecution except in Victoria. The provisions dealing with the compellability of the spouse of the accused as a witness for the accused also differ.[6]
- ***Privilege.*** A communication by a person to his priest, or to his doctor, is not generally protected from disclosure except in Victoria, Tasmania and the Northern Territory.[7] There are different statutory provisions in some of the States and Territories about whether one spouse can be compelled to reveal a communication from the other spouse.[8] New South Wales legislation limits the power of the courts to require the production of government documents and communications. This legislation[9] is restrictive of the common law rules which apply elsewhere in Australia.
- ***Proof of Business Documents and Computer Produced Evidence.*** The legislation dealing with this type of evidence is generally very detailed, and complicated. Although the Commonwealth Evidence Act[10] contains a set of provi-

5. See Terms of Reference and Senate Standing Committee on Constitutional and Legal Affairs *Report on the Evidence (Australian Capital Territory) Bill 1972*, Parliamentary Paper No. 237/1977 para.26.

6. Evidence Act 1929—79 (S.A.), s.16, 18, 21; Law of Property Act 1936 (S.A.), s.101—102; Evidence Act 1910 (Tas.), s.84—86; Criminal Code Act 1924 (Tas.), s.54, 133, 178, 192, 193, 214; Evidence Act 1958 (Vic.), s.24, 26; Crimes Act 1958 (Vic.), s.399—400; Marriage Act 1958 (Vic.), s.160; Evidence Act 1977—79 (Qld), s.7—8; Evidence Act 1906—1979 (W.A.), s.7—10; Justices Act 1902—1980 (W.A.); s.71; Criminal Code Act 1913 (W.A.), s.35, 189, 190, 331; Crimes Act 1900 (N.S.W.); s.407; Married Persons (Property and Torts) Act 1901 (N.S.W.), s.21; Maintenance Act 1964 (N.S.W.), s.33; Evidence Ordinance 1971 (A.C.T.), s.54, 66; Evidence Act 1980 (N.T.), s.7, 9; Maintenance Act (N.T.) s.101B(1).

7. Evidence Act 1958 (Vic.) s.28. Evidence Act 1910 (Tas.), s.96. Evidence Act 1980 (N.T.), s.12

8. Evidence Act 1977—1979 (Qld), s.11; Evidence Ordinance 1971 (A.C.T.), s.54(2); Evidence Act 1958 (Vic.), s.27; Evidence Act 1929—1979 (S.A.), s.18(iv); Evidence Act 1906—1979 (W.A.), s.18; Evidence Act 1910 (Tas.), s.94; Evidence Act 1980 (N.T.), s.9(6); Compare Family Law Act 1975 (Cwlth), s.100(2).

9. Evidence Act 1898 (N.S.W.), Pt VI. Compare *Sankey* v. *Whitlam* (1979) 53 ALJR 11 Cf. Administrative Appeals Tribunal Act 1975 (Cwlth), s.66 and Administrative Decisions (Judicial Review) Act 1977 (Cwlth), s.14.

10. Evidence Act 1905 (Cwlth), Pt. IIIA

sions intended to facilitate the proof of such documents it is doubtful whether it prevents the State and Territory provisions from operating in cases where it may not apply. They contain differences of detail and approach.[11]

- ***Admissibility of Confessions.*** The common law rules controlling the admissibility of confessions have been modified in different ways in some States and Territories.[12]
- ***Unsworn Evidence by the Accused.*** Instead of giving evidence on oath on which he can be cross-examined, an accused person can make an unsworn statement in answer to the prosecution case in some States. Where the right does exist, the law varies on whether the trial judge may comment to the jury in a jury trial.[13]

The Commission invites comment on these points and also the giving of relevant examples of cases where evidence has been excluded in proceedings in Federal Courts held in one State or Territory where it would have been admitted in another and vice versa.

8. Should the Federal Courts operate under a system where the laws of evidence they apply will differ according to the State or Territory in which they sit? This might be thought undesirable for several reasons:

- ***Different Application of Same Law.*** The outcome of a case or the decision on a particular issue in a case can sometimes depend on the laws of evidence. It is possible, therefore, that a case brought in a Federal Court in one State or Territory under legislation such as the Trade Practices Act or the Family Law Act could have a different conclusion if brought in a different State or Territory. Vital evidence necessary to a party's case might be admissible in some States or Territories but not in others. The Federal Courts are hearing proceedings brought under national legislation. It is undesirable that the operation of such national substantive law should vary according to the accident of the place of the hearing. Further, a litigant would be entitled to feel that there was something wrong with a legal system under which he could lose a case relating to the same law and the same facts in one State because of the laws of evidence of that State but could win that same case in another State which had different laws of evidence.
- ***Interstate/Territory Evidence.*** It is possible in the Federal Court and the Family Court for the hearing of the evidence of witnesses to take place in different States and Territories. Under the present arrangements, it is possible that the evidence of a particular witness on a particular point might be inadmissible in one State where it is taken but if arrangements could have been

11. Evidence Act 1898 (N.S.W.), s.14A–14C, 14CD–CV, 43C; Evidence Act 1958 (Vic.), s.55-56; Evidence Act 1977–1979 (Qld), s.92–103; Evidence Act 1929–1979 (S.A.), s.59a–59c, 45–45b, 34c–34d; Evidence Act 1906–1979 (W.A.), s.79B–79E; Evidence Act 1910 (Tas.), s.40A, 81A–81Q; Evidence Act 1980 (N.T.), s.42B; Evidence Ordinance 1971 (A.C.T.), s.28–45.

12. Criminal Law Amendment Act of 1894 (Qld) s.10; Crimes Act 1900 (N.S.W.) s.410; Evidence Act 1958 (Vic.) s.149; Evidence Ordinance 1971 (A.C.T.) s.68; Christmas Island: Criminal Procedure Code (Singapore, as applied), s.121A; Evidence Ordinance (Singapore, as applied), s.25, 26.

13. Evidence Act 1958 (Vic.), s.25; Crimes Act 1958 (Vic.) s.399(3); Crimes Act 1900 (N.S.W.), s.405, 407(2); Evidence Act 1929–1979 (S.A.), s.18(ii) and (viii); Criminal Code Act 1924 (Tas.), s.371(f); Evidence Act 1910 (Tas.), s.85(1)(c) and (h).

made to have that evidence taken to another State it would have been admissible. Similar situations could arise on appeals which take place in a different State or Territory when further evidence is admitted. These, however, will be rare.

- ***The Spectre of Forum Shopping.*** In particular cases it may be advantageous to the plaintiff to bring proceedings in a particular State or Territory because of differences in the laws of evidence. This will remain so whilst the present arrangements continue and State and Territory laws differ.[14]

A solution to such problems would be the adoption of a set of comprehensive rules to apply in the Federal Courts. Such a course of action would add another set of rules of evidence to the existing sets of rules. This might create a burden for some legal practitioners but much would depend upon the extent to which any new rules differed from the existing rules. It would be advantageous for the judges of the Federal Courts and practitioners who specialise in work in the Federal Courts. Further a set of comprehensive rules could provide an impetus to uniform rules of evidence throughout Australia. This has been the experience in the United States of America.[15]

9. ***Exclusion of Documentary Evidence.*** State and Territory laws enable documentary evidence to be tendered without calling as a witness, the person who made the document. Are these laws applicable in the Federal Courts or do they conflict with Commonwealth laws which specify an 'oral' hearing?[16]

10. ***To What Extent is The Judiciary Act applied?*** It has been suggested that the Judiciary Act requirement of applying State or Territory laws of evidence is not always observed. Is this requirement strictly adhered to or are the laws of evidence applied in the relevant courts those with which the trial judge and practitioner appearing in the cases are most familiar? Comment and examples are sought by the Commission on the issue.

11. ***The Common Law.*** Federal Courts apply the common laws rules of evidence[17] — e.g., the requirement that evidence be relevant, the hearsay rule and many of its exceptions, and some of the rules relating to privilege and corroboration. Two connected questions arise:

- On what basis are the common law rules of evidence applied by the Federal Courts?[18]

14. Pryles & Hanks, *Federal Conflicts of Laws* (Butterworths, 1974) 194—5.

15. The Federal Rules operate in Federal Courts in the United States of America. They were approved by Act of Congress in January 1975 and have since been adopted in 18 States.

16. *Ferguson* v. *Union Steamship Co. of N.Z.*, (1969) 119 CLR 191, 195. Judiciary Act 1903 (Cwlth), s.77H, Federal Court of Australia Act 1976 (Cwlth), s.47(6), Family Law Regulations, Regulation 108. Also Evidence Act 1905 (Cwlth), Part IIIA.

17. For example, *Trade Practices Commission* v. *Nicholas Enterprises Pty Ltd & Ors.* (1979) 26 ALR 609 (standard of proof).

18. Sir Owen Dixon, The Common Law as an Ultimate Constitutional Foundation, (1957) 31 *ALJ* 240; O'Brien, The Law Applicable in Federal Jurisdiction, (1976) 1 *UNSWLJ* 327, and (1977) 2 *UNSWLJ* 46. P.D. Phillips Q.C., 'Choice of Law in Federal Jurisdiction', (1961) 3 *MULR* 170, 185. Nygh *'Conflicts of Law in Australia'* (Butterworths, 1971) (2nd ed), 777—88; Pryles and Hanks, 147—183 and 193—4; Z. Cowen, 'Diversity Jurisdiction: The Australian Experience' (1955) 7 *Res Judicatae*, 1, 29—30; I. Renard, 'Australian Inter-State Common Law', (1970) 4 *Fed LR* 87. *Deputy Federal Commissioner of Taxation* v. *Brown* (1958—57) 100 CLR 32, 39; *Musgrave* v. *Commonwealth* (1937) 57 CLR 514; *Pederson* v. *Young* (1964) 110 CLR 32 at 39 (Windeyer J); *The Queen* v. *Oregan*, (1956—57) 97 CLR 323, 330—1; *Parker* v. *The Commonwealth* (1964—65) 112 CLR 295, 306—7 (Windeyer J); *R.* v *Kidman* (1915) 20 CLR 425, *Washington* v. *Commonwealth of Australia* (1939) 39 SR (N.S.W.) 133, 139—40, (Jordan C.J.) The distinction drawn in s.80 between 'statutes' and 'laws' should be noted.

- Where a judge of a Federal Court has to decide what the common law rule of evidence on a particular topic is, does he consider decisions of English, State, Territory, and Federal Courts and how does he resolve any conflicts[19] between them?

12. Difficult legal and jurisprudential points are raised. There may be other problems in this area. Unfortunately, without clear legislation, their resolution could involve considerable expense for litigants. The danger might be avoided, by abandoning the Judiciary Act approach and giving the Federal Courts a comprehensive set of statutory rules of evidence. There may well be some other simpler solutions. The Commission seeks comment on these points.

Specific Evidentiary Problems in Federal and Territory Courts

13. ***Territory Courts.*** In the Australian Capital Territory, there are no provisions in the Evidence Ordinance enabling the use of microfilmed records in evidence, enabling business records to be received as prima facie evidence and enabling computer produced documents to be tendered in criminal proceedings.[20] It has also been suggested that there is a lack of statutory provision facilitating proof of authority for actions of government officers. In the Territory of Norfolk Island, there does not appear to be any statutory provision dealing with computer evidence. The laws of evidence applying on Christmas Island and the Cocos (Keeling) Islands are to be found principally in the 1955 Singapore Ordinance on Evidence which is based on Stephen's Indian Evidence Act 1872. While it is a valuable and comprehensive statement, its terminology is confusing.

14. ***The Federal Court.*** Problems being experienced in the Federal Court in tendering survey evidence have been brought to the Commission's attention.[21] Surveys could be useful in testing issues such as misleading advertising, the nature and size of the relevant market and other issues that arise in cases coming before it. The survey technique is widely used by the business community in making important decisions. Should its use be facilitated in the Federal Court? What changes to the laws should be made?

15. ***The Family Court.*** Difficulties are arising in the Family Court in the admissibility and use of reports of welfare officers and in the controlling of evidence to ensure that time is not wasted in receiving evidence which has only a remote relevance.

16. ***Northern Territory.*** Section 42B, Evidence Act 1980, permits microfilmed record to be tendered. The provision is limited, however, to 'prescribed companies'. This expression includes statutory bodies representing the Crown, banks, public insurance companies, and other public companies specified in the Gazette. This provision has been said to be inconvenient in requiring companies to seek gazettal. Is it still so?

19. For example, *R.* v. *Madobi* (1963) 6 FLR 1 and *R.* v. *Savage* [1970] Tas SR 137; compare *Anglim & Cook* v. *Thomas*, [1974] VR 363 and *Horne* v. *Comino* [1966] Qd.R 202; *R.* v. *Rogers* (1950) SASR 102 and *R.* v. *Donohoe* (1963) 63 SR (N.S.W.) 38; *R.* v. *Brown* [1977], Qd.R 220 and *R.* v. *Hayes* [1977] 2 All ER 288. The question of the binding effect of decisions of the Full Court of the Federal Court upon another Federal Court Full Court is still being considered — see *Wood* v. *City of Melbourne*, (1979) 26 ALR 449 and cases there cited.

20. Evidence Ordinance 1971 (A.C.T.), s.42. The Evidence Act 1905 (Cwlth) Part IIIA does not apply in the Territories.

21. For example, *Macdonald's Systems of Australia Pty Ltd.* v. *McWilliam's Wines Pty Ltd and Anor* (1979) ATPR 40—108 and generally see James A Farmer, 'The Use of Survey Evidence in Trade Practices Cases', CCH *Australian Trade Practices Reporter*, 15—000.

Criticisms of the Laws of Evidence

17. Views are sought from laymen as well as judges and legal practitioners on this topic. It is likely that there are many people who, as witnesses, parties, or jurors have been puzzled, confused, and at times angered by the operation of the laws of evidence. An often mentioned criticism is the way in which rules, for example, the hearsay rule, can interrupt the natural chronological flow of the evidence and affect the composure of the witness. Are other difficulties experienced by laymen — should a witness first tell his own story without interruption by judge or counsel? Are there examples where the rules of evidence have excluded evidence of value? The hearsay rule can cause artificial situations, for example:

Q. Did you say something to the butler? — A. Yes, I did.

Q. As a result, did he do something? — A. He left the room.

Q. After a while, did he come back and say something to you? — A. Yes.

Q. As a result, where did you go? — A. I went upstairs to the bedroom door.

Q. What did you do there? — A. I looked through the keyhole.

Q. And what did you see? — A. I saw what the butler said he'd seen.[22]

Are the rules too technical, unclear and too rigid? Some possible criticisms are set out in paragraphs 18 to 21.

18. ***Technical and Unclear Areas.*** The following rules might be described as technical or unclear or both:

- the hearsay rule and its exceptions— common law and statutory;
- the laws relating to corroboration;
- res gestae;
- when does an attack on the credibility of a witness become an attack that he has recently invented the evidence?
- the admissibility against employers of admissions made by their employees;
- the laws relating to issue estoppel and res judicata;
- some of the rules relating to the admissibility of confessions;
- cross-examination of an accused as to character and prior convictions;
- standard of proof of the commission of a crime required in civil cases;
- extrinsic evidence to aid in the interpretation of documents;
- conflicting presumptions and also the effect of presumptions on the burden of proof;
- failure to give evidence by an accused person and the use that may be made of it in summary proceedings[23];
- the judicial discretion to exclude confessions and prejudicial evidence.

19. ***Do Some Rules have 'Absurd' or 'Undesirable' Results?*** For example:

- the rule which prevents a court in civil proceedings receiving as evidence proof of the finding of a criminal court on issues raised in the civil proceedings[24];

22. E. Griew, 'What the Butler Said he Saw', 1976 *Crim LR* 21.

23. *May* v. *O'Sullivan* (1954–55) 92 CLR 654

24. *Hollington* v. *Hewthorn* [1943] KN 587. Cf. ALRC 11, *Unfair Publications*, 297. s.83 Trade Practices Act 1974 (Cwlth).

- res gestae — e.g., in Bedingfield's case[25], evidence of the exclamation — 'oh dear, Aunt, see what Bedingfield has done to me' — made by a dying woman rushing out of a room with her throat cut, could not be tendered;
- the hearsay rules and its exceptions — the rule can exclude evidence of value and the exceptions can allow evidence of no value to be received;
- the law that what is seen on a view cannot be used as evidence but only to assist in the better understanding of the evidence;

20. ***Are The Laws of Evidence Difficult to Apply?*** Anyone seeking to apply the laws of evidence will experience difficulties because:

(a) as far as common law rules are concerned an examination of case law sometimes back into past centuries is necessary;
(b) an examination is required of statutory provisions which at times are very detailed and complicated and difficult to find.

21. ***Are the Laws of Evidence Ignored?*** Evidentiary rules are often waived by parties in litigation. At times they are ignored. How widespread is this? Does it occur because of deficiencies in the laws of evidence? Does this lead to injustice when a party requires the strict application of evidentiary rules catching the other party unprepared?

Technological Change

22. Attempts have been made throughout Australia to deal with the problems created by existing rules of evidence for the tendering of computer produced evidence. Technology in this area, however, continues to develop at a rapid rate and the question arises whether current law is adequate for new information media and whether problems are in fact being experienced in tendering evidence which consists of material stored in computers, processed by computers, and produced by computers. Do the laws of evidence need modification to facilitate proof of telex, satellite, and other modern forms of communication?[26] Are there problems in the use of evidence produced by modern equipment such as satellite photographs?[27] Do the laws of evidence prevent the use of video taped evidence and should this be allowed? It might be of great convenience and less expensive to allow oral evidence to be recorded and given in this way.[28] The disparity between the community's use and the law's use of survey evidence has already been noted.

Uniformity

23. The terms of reference require the Commission to consider the issue of uniformity in the laws of evidence for Federal and Territory courts. It is difficult, however, to formulate an argument against uniform laws of evidence for those courts.

25. 14 Cox 341. The evidence was held inadmissible on the ground that, amongst other things, the statement did not form part of the alleged event — the assault on the victim — but was a description of the event.

26. Evidence Act 1910 (Tas.), s.41—3; Evidence Act 1977—1979 (Qld) s.75—77; Evidence Act 1906—1979 (W.A.) s.82—88; Evidence Act 1980 (N.T.) s.50—56; Evidence Act 1929—1979 (S.A.) s.53—59. The provisions facilitate the proof of telegraph messages.

27. *Freeman* v. *State Rivers and Water Supply Commission of Victoria*, 1975. An American satellite took photographs of flood waters. The question of admissibility of that evidence was not the subject of any decision by the courts. The case is discussed in (1977) 6 *Remote Sensing of Environment* 51—61.

28. Compare Family Law Regulations, Reg. 108(5) (Cwlth).

> In all or nearly all matters of private law there is no geographical reason why the law should be different in any part of Australia. Local conditions have nothing to do with it. Is it not unworthy of Australia as a nation to have varying laws affecting the relations between man and man? Is it beyond us to make an attempt to obtain a uniform system of private laws in Australia.[29]

There may, however, be good reasons why the laws of evidence applied in Federal Courts and Territory courts should differ — for example, problems peculiar to a particular court. The Commission invites comment on this issue.

24. The Commission is also required[30] to consider proposals for uniformity between the laws of the Territories and the laws of the States. Submissions are invited on this point.

Basic Issues

25. An issues paper has been prepared which canvasses in detail the following fundamental questions:

(a) ***Definition.*** What is the proper subject matter of the laws of evidence?

(b) ***Nature and Purpose of the Trial.*** What is the nature and purpose of the civil and criminal trial?

- Is the trial a search for truth? If it is not under present laws should it be?
- Should any alteration be made to the nature and purpose of the civil and criminal trial?
- What changes should be made to the laws of evidence if any of the above changes are made?

(c) ***Civil Rules and Criminal Rules.*** Assuming no change is made to the present trial system and its purposes, what are the consequences for the laws of evidence which flow from the nature and purpose of the civil and criminal trial?

- Should we distinguish in the laws of evidence between civil and criminal trials?
- Which evidentiary rules are common to both civil and criminal proceedings and which evidentiary rules apply only in civil or criminal proceedings.
- Should the common ground and the differences be reflected in evidentiary rules where appropriate or should we allow a concern for uniformity to override this approach?
- In civil proceedings should the emphasis be on receiving all evidence of probative value which the parties wish to tender subject only to considerations of costs and fairness?
- In civil or criminal proceedings should the trial judge have the power to call and question witnesses in any and if so what circumstances?
- Should we seek to introduce flexibility into the laws of evidence applicable in civil proceedings? If so what method or methods should be used?

29. Sir Owen Dixon, (1957) 31 *ALJ* 325 at p.342, commenting on the paper of Shatwell, Some Reflections on the Problems of Law Reform, id., 325.

30. Law Reform Commission Act 1973 s.6(1) and Terms of Reference.

- In criminal proceedings should the emphasis be to continue to apply detailed rules?
- In criminal proceedings should the emphasis be to admit against the accused only that evidence which can be tested by cross-examination?
- In criminal proceedings should the emphasis be to continue to require the production of the best evidence that is available?
- In criminal proceedings, should a distinction be drawn between the Crown and the accused in formulating rules of evidence?
- In criminal proceedings should proposals for reform of the laws of evidence be rejected if they affect the balance of the rights between the Crown and the accused in favour of the Crown or the accused?

(d) ***Particular Purposes.*** What purposes are served by the laws of evidence? Do the laws of evidence serve any of the following purposes —

- providing part of the machinery for the adversary system;
- ensuring that justice is done and seen to be done;
- limiting the duration and expense of the trial;
- ensuring that all evidence of probative value is placed before the courts;
- controlling the quality of the evidence;
- minimising the risk of the jury being misled;
- guiding the court about what material it can act upon and how to use it;
- giving effect to policy considerations that must restrict disclosure;
- giving a measure of certainty by using detailed rules to serve some or all of the above purposes?

Are there any other purposes which are served by the laws of evidence? How successfully do the laws of evidence serve any of the purposes that can be identified?

(e) ***Abandonment or Modification of Purposes.*** Should any of the purposes or the means of achieving them be abandoned or modified? In particular -

- ***Conflicts.*** What conflicts exist? Can they be resolved and if so how?
- ***Certainty.*** Should the pursuit of 'certainty' be abandoned or relaxed? Can a satisfactory level of certainty be achieved without using detailed rules of evidence and the doctrine of precedent? If not:
  - In what proceedings should the pursuit of certainty be relaxed or abandoned?
  - What method or methods should be used?
- ***Quality Control.*** Should we abandon or modify the attempt to control the quality of the evidence? If so,
  - In what proceedings?
  - In what manner?
  - To what extent and in what circumstances?

- ***The Jury.*** Do we need to protect the jury from being misled or confused?
  - •• Can this question be ignored in view of the non-use of juries in civil proceedings in the relevant courts and the quality of juries? Is the critical distinction in fact that between civil and criminal trials and not that between jury and non-jury trials?
  - •• If the question cannot be ignored, do we mistrust the jury's ability to assess and use evidence?
  - •• If we do mistrust the jury's abilities, is this mistrust justified?
  - •• Should we have separate rules for jury/non-jury trials, or are judges and magistrates also susceptible to being misled or confused by evidence such as hearsay and bad character evidence?

(f) ***Choice of Purposes.*** What purposes ***should*** be served by the laws of evidence?

(g) ***Principles.*** Upon what principles should any statutory statement or statements of the Laws of Evidence be based?

Summary of Issues

26. Assistance is sought on the following matters:

(a) ***Definition*** — The definition of the subject matter, the 'laws of evidence. (para. 4 & footnote 4)

(b) ***Program*** — are there any other matters that should be examined by the Commission. (para. 4)

(c) ***Psychological Assumptions*** — What assumptions are made? Are they valid? Can they be tested and if so how? (para. 4)

(d) ***Ethnic Issues*** — Do the laws of evidence create special problems for members of ethnic groups in our society? What are the problems and what are their solutions? (para. 4)

(e) ***The Operation of s.79 and s.80 Judiciary Act 1903.*** Have examples occurred in practice of:

- evidence being excluded in Federal Courts in one State or Territory which would have been admitted in another State or Territory and vica versa;
- proceedings being transferred from one State or Territory to another in the federal courts;
- evidence in proceedings being taken in more than one State or Territory?

Comment is also sought on the problems in the operation of s.79 and 80 Judicary Act 1903 suggested in this paper — different laws, exclusion of documentary evidence, the ignoring of the Judiciary Act, the application of the common law rules in federal courts. Are there other difficulties? (para. 7 to 12)

(f) ***Particular deficiencies*** — What particular deficiencies are to be found in the laws of evidence operating in Federal and Territory courts? Comment is sought on the problems identified in this paper. Are there others? (para. 13 to 16)

(g) ***General Criticisms*** — Examples are sought from the personal experience of laymen and from judges and legal practitioners of situations where the laws of evidence have proved unsatisfactory. Comment is also sought on the list of topics referred to in this paper. (para. 17 to 21)

(h) ***Technological Change*** — What problems presently exist as a result of technological change? What changes are likely to occur and what will be the ramifications for the laws of evidence? (para. 22)

(i) ***Uniformity*** — Should there be uniform evidence laws operating in Federal and Territory Courts? If not, what distinction should be drawn and why? (para. 23) Proposals for uniformity in State and Territory laws of evidence are invited. (para. 24)

(j) ***Issues*** — Comment is sought on the issues listed in paragraph 25 of this paper.

Reference on Evidence

COMMONWEALTH OF AUSTRALIA
LAW REFORM COMMISSION ACT 1973
TERMS OF REFERENCE : THE LAW OF EVIDENCE

I, PETER DREW DURACK, Attorney-General of the Commonwealth of Australia, HAVING REGARD TO:

(a) the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs, made in its Report on the Reference : The Evidence (Australian Capital Territory) Bill 1972 that:
   (i) a comprehensive review of the law of evidence be undertaken by the Law Reform Commission with a view to producing a code of evidence appropriate to the present day; and
   (ii) a Uniform Evidence Act be drafted:
      — to apply the same law of evidence to A.C.T. and to the external Territories;
      — as far as is appropriate, to apply the same law of evidence in all Commonwealth courts and tribunals; and
      — to include the matters now covered in the Evidence Act 1905 and the State and Territorial Laws and Records Recognition Act 1901; and

(b) the need for modernization of the law of evidence used in Federal Courts, the Courts of the Australian Capital Territory and the external Territories and Federal and Territory tribunals by bringing it into accord with current conditions and anticipated requirements;

HEREBY REFER to the Law Reform Commission as provided by the Law Reform Commission Act 1973 TO REVIEW the laws of evidence applicable in proceedings in Federal Courts and the Courts of the Territories with a view to producing a wholly comprehensive law of evidence based on concepts appropriate to current conditions and anticipated requirements AND TO REPORT:

(a) whether there should be uniformity, and if so to what exent, in the laws of evidence used in those Courts; and

(b) the appropriate legislative means of reforming the laws of evidence and of allowing for future change in individual jurisdictions should this be necessary.

IN MAKING ITS INQUIRY AND REPORT the Commission will have regard to its functions in accordance with sub-section 6(1) of the Act to consider proposals for uniformity between laws of the Territories and laws of the States.

DATED this 18th day of July 1979.

Peter Durack
Attorney-General