The Law Reform Commission

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EVIDENCE LAW REFORM STAGE 2

THIS PAPER IS NOT A COMMISSION REPORT. It sets out the Commission's tentative conclusions on the need for uniformity in and reform of the laws of evidence applied in the High Court, the Federal Court, the Family Court and the courts of the Australian Territories. This paper also summarises some of the more significant reforms that the Commission proposes should be made to the laws of evidence.

A comprehensive treatment of these issues and the detailed proposals are contained in the Commission's Interim Report 'Evidence' which may be obtained from the Australian Government Bookshops around Australia.

THE VIEWS EXPRESSED IN THIS PAPER DO NOT REPRESENT THE COMMISSION'S FINAL VIEWS. THEY ARE PUBLISHED TO RAISE ISSUES AND PROMOTE DISCUSSION.

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Commission Reference: ALRC DP 23

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EVIDENCE LAW REFORM STAGE 2

Table of Contents

The Reference

1. ***Program and Progress.*** Under the terms of its reference on the laws of evidence, the Law Reform Commission is required to review the laws of evidence applying in federal courts[1] and the courts of the Territories 'with a view to producing a wholly comprehensive[2] law of evidence based on concepts appropriate to current conditions and anticipated requirements'. The Commission is also asked to report on:

(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 a future change in individual jurisdictions should this be necessary.

2. In Discussion Paper No 16, Reform of Evidence Law (1980), the Commission outlined its program for the reference. The program was divided into two major exercises. The first was a review of the laws of evidence. The second was the preparation of a report on whether and to what extent there should be uniformity in the laws of evidence applied in the relevant courts and what reforms should be advanced. The results of the review of the law are summarised in an Interim Report – Report No 26 (Interim) *Evidence* – recently presented to the Attorney-General. Work has advanced on the second stage and the commission has reached tentative conclusions on the issues of uniformity and reform.

Issues of Uniformity and Reform

3. ***Commission's View.*** The Commission has reached the following tentative conclusions:

- ***Uniformity.*** Federal courts apply the laws of evidence of the State or Territory in which they happen to be sitting.[3] At present there is uniformity between the courts of a State and the federal courts when sitting in that State, not between federal courts sitting in different States. The

1. The High Court, the Federal Court and the Family Court.

2. The Supreme Court and Courts of Petty Sessions of the Australian Capital Territory, Norfolk Island, Christmas Island and the Cocos (Keeling) Islands.

3. Judiciary Act 1903 (Cth) s79, 80.

issue is whether, if there must be some lack of uniformity, it is better that there be uniformity between State and federal courts sitting in a particular State, or between all federal courts throughout Australia. The Commission is strongly in favour of the latter on grounds of convenience and principle. But even disregarding those considerations, if the choice is between leaving federal courts to administer complex, obscure and conceptually unsound laws of evidence which contain many uncertainties, and introducing a simpler and up-to-date law of evidence, the choice is clear. For these reasons, the Commission proposes that a comprehensive Evidence Act should apply in proceedings in federal courts and courts of the Territories.

- ***Reform.*** The Commission is of the view that the law of evidence is badly in need of reform. The present law is the product of unsystematic statutory and judicial development. It is a highly complex body of law which is arcane even to most legal practitioners. It contains traps and pitfalls which are likely to leave the litigant baffled, frustrated and defeated. The law of evidence differs widely from State to State. The differences from jurisdiction to jurisdiction derive not only from differences in Evidence Acts but also from differences in the common law applied by the courts of the various States. There are also many areas of uncertainty in the laws of evidence – areas on which definitive law is yet to be pronounced by the courts.

4. ***The Opposing View.*** A common assertion made by legal practitioners, magistrates and judges, however, is – 'the system is working, what is the fuss?'[4] Who is right – the critic of the law or the defender? The answer would seem to be that both are right. The law 'works' by being ignored. 'The reason is not that the complexity is mastered but that it has been ignored'.[5]

5. It is necessary to distinguish between the law of evidence as it is set out in the law reports, statutes and text books and the law of evidence as it is applied in practice. It is possible to criticise its complexity, uncertainty, impracticality, illogicality, rigidity, unfairness – its gobbledegook. It is possible to criticise 'the lush exuberance of doctrines which bloom in the digests and the six volume treatises on evidence and the sharp quiddities of the class room'.[6] It is also possible, however, to say that the system is working in practice – in the sense that we make do. There are several reasons. Few lawyers have a detailed knowledge of the law of evidence – its complexities are not mastered but ignored. Lawyers cannot be blamed for this because the law of evidence is too complicated. Not being aware of its detail, it is possible to believe that there is not a great deal wrong with it. Not having the time to look critically at the whole of the law of evidence we see only one deficiency at a time. Not having a better alternative to consider we accept what we have. In

4. A similar reaction was found in the United States of America and Canada when attempts were made to reform the laws of evidence: Brooks, 'The Law Reform Commission of Canada's Evidence Code' (1978) *16 Osgoode Hall LJ* 1, 242; RP Anderson, 'A Criticism of the Evidence Code: Some Practical Considerations' (1977) 11 *UBC LR* 163, 166.

5. RE Degnan, 'The Law of Federal Evidence Reform' (1962–63) 76 *Harvard L Rev* 275, 6. See also EM Morgan, *Some Problems of Proof under the Anglo-American System of Litigation.* Columbia University Press, New York, 1956, 194; Brooks, 260.

6. D McCormick, 'Tomorrow's Law of Evidence' (1938) 24 *ABAJ* 507, 508.

addition, the law of evidence as practised is a drastically simplified version of the law. In preparing for trial and during the hearing 'rules of thumb' are applied.[7] In preparing for trial, evidence will be discarded which does not satisfy the rules of thumb and this in turn will reduce the problems in the court room. Further, at the trial, the parties often waive rules of evidence.[8] Often, too, the trial judge will try to discourage technical objections.

6. If this description of what happens in practice is correct – it has been confirmed in numerous discussions – it is in itself an indictment of existing law. Further, there has been a de facto reform of the law of evidence. It is a method of a reform, however, that carries with it grave dangers. It arises through ignorance and omission and is not soundly based on reason or a properly considered rationale.

> The rules are being changed day by day in the courtrooms, legislative halls and lawyers' offices. The question is not should we change, but should changes take place in accordance with an acceptable rationale.[9]

The problem with our existing approach is that the rules lie in wait for any practitioner to use when it is to his client's tactical advantage. Such a system will function while the practice is adhered to but will break down with potentially serious results when one party decides to take advantage of the rules.

7. ***Conclusion.*** The Interim Report sets out the significant inconsistencies that exist between the laws of evidence applying in the States and Territories. It also identifies areas of uncertainty and other criticisms that can be made of particular rules. They are found in all areas of the laws of evidence. The Commission's present view is that there is a very strong case for the provision of uniform comprehensive laws of evidence for federal and Territory courts and for such laws to be enacted in legislation which addresses the deficiencies in the present law. The Commission, however, invites a response to the issues raised in the Interim Report and to the tentative conclusions it has reached on these topics.

An Evidence Act

8. ***The Test.*** Before making any final recommendations the Commission must, in addition to seeking responses on the above issues, formulate draft proposals to test the viability both of a uniform comprehensive Act and of particular reforms of the laws of evidence. To this end, it has prepared draft legislation which is set out in the Interim Report together with a commentary. In working towards the draft legislation, the Commission followed a research

7. For example – evidence must be relevant to be admissible; hearsay evidence is not admissible; do not forget to claim legal privilege; you cannot lead a witness in evidence in chief but you can lead a witness in cross-examination; in a criminal trial, a confession must be voluntary; the judge has a discretion to exclude prosecution evidence.

8. For example – permitting the policeman to read his notes without going through the process of exhausting his memory or attempting to refresh his memory from them; waiving the hearsay rule for commercial records, hospital records, and the hearsay and opinion rules for doctors reports; permitting photocopies and prints from microfilms to be used; not requiring formal proof of regulations, by-laws and proclamations.

9. JB Weinstein, 'Alternatives to the Present Hearsay Rules' (1968) 44 *Fed Rules Decisions* 375, 388.

program in which some 16 research papers were produced. These were distributed widely to legal professional bodies, magistrates, academics involved in teaching evidence, federal and State judges and retired judges, the police, legal practitioners and other interested persons and organisations. Many submissions were received and considered. In addition regular meetings were held with consultants over a period of approximately two years to discuss the draft proposals. These proposals were then revised and brought together after further consulation into the one piece of legislation. An object of the Interim Report is to seek responses to that proposed legislation.

9. ***Topics.*** The proposed legislation deals with the following major topics:

- ***witnesses*** – competence and compellability of witnesses; sworn and unsworn evidence; the manner of giving evidence;
- ***the admission and exclusion of evidence*** – relevant evidence; documents; hearsay evidence; opinion evidence; admissions; judgments and convictions as evidence of the facts on which they are based; character and conduct evidence (including evidence relating to the credibility of witnesses); identification evidence; privileges; evidence excluded in the public interest; discretions to exclude evidence; and
- ***aspects of proof*** – judicial notice; facilitation of proof; standard of proof; corroboration; warnings to juries.

10. ***Policy Framework.*** While much has been written in the past about the content of the laws of evidence, little has been written about the purposes that they should serve. The Interim Report[10] discusses the competing policy objectives and sets out the policy framework that has been adopted. Pre-eminence is given to the factfinding task of the courts. The credibility of the trial system ultimately depends on its performance in this area. So the proposals are directed primarily to enabling the parties to produce all the probative evidence that is available to them.[11] Departures from this objective require justification – for example, balancing fairness, considerations of cost and time.

11. The different nature and objectives of the civil and criminal trial have been taken into account. Both are adversary systems, but the former is a system for resolving disputes and the latter is an accusatorial proceeding in which the State accuses the defendant of breaking the law. Individual liberty and civil liberties are at stake in criminal trials. Although issues equal to or approaching the seriousness of those raised in criminal proceedings are raised at times in civil proceedings – for example, questions of fraud, bankruptcy, divorce and custody – the differences between the essential nature and purposes of civil and criminal proceedings still apply whatever the subject matter of the particular proceeding.

12. Furthermore, a traditional concern of the criminal trial system has been to minimise the risk of wrongful conviction. Accepting this, a more stringent approach has been taken to the admission of evidence against an accused per-

10. See also Australian Law Reform Commission, Issues Paper No 3, *Evidence Law Reform*, 1980.

11. Law Reform Committee, Great Britain, Thirteenth Report, *Hearsay Evidence in Civil Proceedings*, HMSO, London, 1966 (LRC13) 4.

son than to admission for the accused's benefit. This distinction has also been recognised in other areas – for example, the compellability of the accused, cross-examination of the accused, unsworn evidence by the accused, evidence of prior conduct and character. The effect that the proposed reforms will have on the balance between prosecution and defence in criminal trials has been borne in mind at all times.

13. The proposals also reflect a bias towards minimising judicial discretion, particularly in those provisions controlling the admissibility of evidence. Wherever possible, a proposal is presented in the form of a rule. Only where the relevant policy considerations prevent this have proposals in the form of discretions been advanced. A reasonable level of predictability is needed to enable parties to prepare for trial and to assess their prospects of success. It must also be remembered that the laws of evidence must often be applied by the courts without substantial time for reflection.

14. At all times consideration has been given to the impact of any change on the time and cost of litigation and on the time and cost of activities outside the courtroom. At all times clarity and simplicity have been primary objectives. Reform proposals are advanced only in relation to criticisms of the law thought to be valid. An attempt has been made to reduce the significant level of uncertainty in existing law. Technicalities have been minimised so that the problem of the rules lying in wait for the unwary has been reduced. The legislation also significantly rationalises existing law. At the same time, anyone who is familiar with the existing law will find much in the legislation that is recognizable. In a number of areas it may be thought that little has been changed. There are, however, a number of proposals which involve significant reform of to the law.

The Draft Bill – Significant Proposals

15. ***Rules of Admissibility.*** The legislation sets out the rules to control the admissibility of evidence. The primary rule is that if evidence is relevant, directly or indirectly, to an issue in a case, it is admissible unless otherwise excluded. If it is not relevant, it is inadmissible.[12] The legislation then sets out those other rules of admissibility which will operate to exclude evidence even though it is relevant to the issues in a case. Again, in reading the proposals, people familiar with the present rules of evidence will find much that is familiar. The proposals build upon but rationalise and reform existing law.

- ***Hearsay Evidence.*** The common law rule excluding evidence of out-of-court statements and its exceptions have been the object of repeated criticism for many years – 'absurdly technical', 'a conglomeration of inconsistencies', 'an old-fashioned crazy-quilt made of patches cut from a

12. The legislation defines relevant evidence as evidence which, if it were accepted, could rationally affect the assessment of the probability of the existence of a fact in issue. It also articulates the discretion inherent in definitions of relevance presently used by including a residuary discretion to exclude evidence where its probative value is outweighed by the disadvantages of its admission – eg time, cost, risk of confusion etc (the approach taken in the US Federal Rules.)

group of paintings by cubists, futurists and surrealists'.[13] The difficulties created by the common law are reflected in the vast body of differing legislation which has attempted to address problems, usually on an ad hoc basis[14]. It is, however, additional to the common law exceptions. This has added to the 'crazy-quilt' effect of the law. Dissatisfaction with the law in the United Kingdom and in Commonwealth countries has resulted in, at last count, at least twelve reports by law reform bodies in recent years.

The hearsay rule, perhaps more than any other rule, is often waived (particularly in civil proceedings) or simply ignored. Practices have developed of waiving strict adherence to the rule – for example, in relation to records such as hospital records or statements of fact on which an expert's opinion is based. It lies in wait for technical use by a party against whom the evidence is led.

The present law also excludes probative evidence and thus detrimentally affects the fact-finding processes; it operates unfairly between the parties by excluding the best evidence available to them; it causes unnecessary expense.

The present law is correct, however, in taking the position that, prima facie, hearsay evidence should not be admitted. As a general proposition it is a category of evidence that should be regarded as significantly unreliable and for that reason warranting special treatment. Its poor quality may adversely affect the fact finding of the courts.

In addition, it carries with it a number of dangers – the party against whom the evidence is led may not have a fair trial; it may add to the time and cost of litigation; there is the risk of fabrication of evidence and surprise. This highlights the problem of reform in this area.[15] While the rule against hearsay evidence may be strongly criticised, its relaxation can give rise to the same criticisms. The proposal maintains the approach that hearsay, prima facie, should be excluded and advances exceptions.

In formulating the exceptions policy guidelines were developed from those referred to above. The suggested starting point is that the 'best evidence available' to a party should be received.[16] This will assist the parties to present all relevant evidence available to them and give the court the competing versions of the facts. In so doing, the fact-finding will, on balance, be enhanced and so will the fairness of the trial process. The

13. Respectively – Lord Reid in *Myers v DPP* [1965] AC 1001, 1019; EM Morgan, Introduction, in American Law Institute, *Model Code of Evidence*, Philadelphia, 1942, 46–7; EM Morgan and JM Maguire, 'Looking Backward and Forward at Evidence' (1937) 50 *Harv LR* 909, 921.

14. Note – legislation has been enacted in Tasmania and the ACT which attempted a more general reform of the area. In both jurisdictions, however, the common law rule and exceptions continue to apply subject to the changes made in the legislation.

15. Compare, for example, the range of views in (1971) 45 *ALJ* 559ff.

16. LRC 13, 6; see also GF James, 'The Role of Hearsay in a Rational Scheme of Evidence' (1940) 34 *Ill L Rev* 796ff; DE Harding, 'Modification of the Hearsay Rule' (1971) 45 *ALJ* 531, 536, 559, 560.

concept involves two elements – the quality of the evidence and its availability. The quality of hearsay evidence will vary considerably. Some categories of hearsay evidence, however, can be isolated and have been for the purposes of the proposal.

(a) ***Remote Hearsay.*** A distinction should be drawn between first-hand[17] and second-hand hearsay. Second-hand hearsay is most unreliable. It is also very difficult, if not impossible, to assess its weight in most cases.[18] Further, it would, if admitted, add significantly to the cost and time of proceedings. It should be inadmissible except where some guarantees of reliability can be shown together with a need for its admission.

(b) ***'Contemporaneous' First-hand Hearsay.*** A distinction should be drawn between statements made during or shortly after the events to which they refer and later statements. Experience suggests that the account of an event given at or shortly after the event will be more accurate than one given months or years later. Psychological research[19], however, suggests that loss of memory is more dramatic than we realise and that we under-estimate the extent to which the memory is affected by a variety of distorting factors over time. It may be argued that evidence of a statement made shortly after the event will generally be the best available evidence and that any exceptions drawn should recognise this.

The element of 'availability' raises at least two issues. First, where an eye-witness has, for example, died, evidence of his out-of-court statement will be the best evidence available of what he saw. Secondly, what is the best available evidence may depend upon a balancing of the importance and quality of evidence against the difficulty of producing it.

A major qualification must be made for criminal trials. The concern to minimise wrongful convictions requires the maintenance of a more cautious approach to the admission of hearsay evidence against the accused. The best available evidence for the prosecution should not necessarily be received. Where the maker is unavailable some guarantees of trustworthiness should be required (as at present in some common law and statutory exceptions). That same concern, however, reinforces the desirability of an approach without such limitations for evidence led by the accused – for example, statements by the alleged victim exonerating the accused. In addition, the cost of producing available direct evidence for the prosecution should be regarded as an issue

17. First-hand hearsay evidence is evidence of representations of fact made by persons with personal knowledge of the facts stated or persons who might reasonably be supposed to have such personal knowledge. More remote hearsay evidence is described in the text as second-hand hearsay evidence and is evidence of representations of fact made by persons who do not have personal knowledge of the facts.

18. LRC 13, 7–8. See also Criminal Law Revision Committee, Eleventh Report, *Evidence (General)*, London, para 224; Harding, 537.

19. Australian Law Reform Commission, Report No 26 (Interim), *Evidence*, AGPS, Canberra, 1985, para 665–6.

of minimal significance. The accused is entitled to confront those who accuse him and expect that he will not be convicted on hearsay evidence where the person who made the statement is available.

Where reforms will lead to an increase in the hearsay evidence admissible in trials, consideration must be given to appropriate safeguards to minimise surprise and the possibility of fabrication and to enable the party against whom it is led to investigate it, meet it and test it whether by cross-examination or other means. Any relaxation of the hearsay rule will enable more evidence to be led and result in collateral issues being raised. The benefits of any proposal must be compared with the likely addition to the time and cost of litigation.

In summary, the proposal is divided into provisions relating to first-hand hearsay and more remote hearsay.[20] As to first-hand hearsay, the following applies:

(a) ***Civil Proceedings.***[21] In civil proceedings, where the maker of the out of court statement is unavailable, first-hand hearsay should be admissible on notice to the other parties. Where the maker of the statement is available, evidence should be admitted without calling the maker if to do so would involve undue delay or expense or would not be reasonably practicable. Where the maker is or would be called as a witness, the hearsay evidence should be limited to that made at the time or shortly after the events referred to in it.[22]

(b) ***Criminal Proceedings.*** Hearsay evidence should not be admitted against an accused person unless it is the best evidence that is available and it can be shown to have reasonable guarantees of reliability.[23] On the other hand, an accused should be allowed to lead hearsay when it is the best evidence he has available to him. So, where the maker of the statement is not available, first-hand hearsay should be admissible for the prosecution on notice provided it satisfies specified guarantees of reliability. It should be admissible for the accused on notice. Where the makes is available, he must be called and only statements made at or shortly after the relevant events should be admitted.

As to more remote hearsay, specific categories of evidence should be admissible on the basis of their reliability or necessity, or on both grounds. Categories include — government and commercial records, reputation as to family relationships and public rights, telecommunications, commer-

20. Two members of the Commission have dissenting proposals — one is to codify the common law exceptions for first-hand hearsay, the other to provide a discretion to admit hearsay.

21. These proposals are developed from LRC 13 and the English Civil Evidence Act 1968.

22. It is the 'best available' evidence and to admit later statements could significantly add to the time and cost of trials without any matching benefit.

23. These proposals are developed from and rationalise existing exceptions.

cial labels and tags.[24] The rules relating to hearsay evidence and all other rules of admissibility are subject in both civil and criminal proceedings to the relevance discretion which will enable the court to exclude evidence where the probative value of the evidence is substantially outweighed by the disadvantages of receiving it.[25] In addition, in criminal trials, the common law discretion to exclude prosecution evidence where its prejudicial effect outweighs its probative value is retained.

- ***Secondary Evidence of Documents.*** At common law the original document must be produced unless it is shown that it cannot be produced. This applies regardless of the importance of a document in the case in question. Even a party in possession of the original document can object to the other party tendering secondary evidence of it where the tenderer did not make any formal request to have the original document made available. Evidence is also required to authenticate any copy document regardless of its importance, the obvious authenticity of the copy, and regardless of whether there is any genuine need to have authenticating evidence. The application of common law rules has given rise to particular difficulties in proving the contents of writings contained in modern photocopies and microfilm:

  (a) ***The Original Documents in Existence.*** Many organisations keep their records in copy form using various techniques. Microfilming, in particular, results in large cost savings by reducing storage costs and making retrieval of records easier. Tax and other legislation, however, requires that original business records be retained. As a result, the original writing will often be in existence at the time of the trial. Where this is so, the common law would require the original to be produced. It may, however, be difficult and costly to find it and to get it to court whereas the business could easily and cheaply produce the copy records.

  (b) ***Evidence Authenticating the Copy.*** Strictly, the evidence authenticating the copy should be given by a person who examined both the copy and the original, or who can give evidence of the accuracy of the machine when it made the copy. This can be a particular problem for large organisations seeking to prove the contents of records upon which they rely from day to day. The relevant persons may have left the business or government department and it may not be possible to find them. Even, if they can be found, they are unlikely to remember. Calling each person as a witness can be a costly and inconvenient exercise which, in most cases, is not warranted.

  An attempt was made in the 1960s to enact uniform legislation to deal with modern techniques of reproducing documents. This legislation, regrettably, is so complex that few organisations have attempted to comply with it. The legislative proposals in the report attempt to rationalise

24. These proposals are developed from existing Commonwealth and State legislation and the common law.

25. Under existing law, this control is provided by the discretion inherent in the requirement of relevance.

the common law and the legislation. Technicalities have been removed and special provisions are included to enable government and commercial records kept in microfilm and other copy forms to be proved by production of such copy records or prints made from them notwithstanding the availability of the original document. Provisions are also advanced to facilitate the authentication of copies and, in particular, copies of commercial and government records.

- ***Admissions and Confessions.*** The present test, in criminal trials, for the admissibility of admissions and confessions by an accused person is whether the admission or confession was made voluntarily. An examination of the decided cases, however, reveals uncertainty as to whether this test is directed towards maximising the probability of the truth of the admission or confession or whether it is directed to ensuring compliance with the law and respect for civil liberties on the part of law enforcement agencies. The concept of voluntariness is unsatisfactory. There is uncertainty about the following:

  - whether a choice to speak must have been made and, where external factors have come into play, whether they must destroy the ability to choose or simply be a cause of the making of the confession;
  - the relationship between the 'voluntariness test' and the specific rules relating to threats and promises by persons in authority and the content of those rules;
  - the meaning and relevance of 'oppression';
  - the relevance of the use of deception;
  - whether the test applies only where there has been (police) misconduct;
  - the extent to which and the circumstances in which the personal characteristics of the suspect are relevant – eg mental illness, age.

  The proposals address the two principal policy objectives of the voluntariness rule – maximising the probability of the truth of the admission and the preservation of the rights of the individual suspect – by advancing three main proposals:

  (a) to be admissible, an admission must be shown not to have been influenced by violent, oppressive, inhuman or degrading conduct;

  (b) to be admissible, an admission must be shown to have been made in circumstances unlikely to affect its truthfulness adversely; and

  (c) evidence obtained illegally or improperly shall be excluded unless the court is persuaded that the balance of public interest clearly favours admission – developed from the present common law discretion.

  The legislation however, does not retain the discretion to exclude evidence of an admission or confession which is based on unfairness to the accused (the 'Lee' discretion). 'Fairness' is a vague concept and the courts have not defined precisely the principles behind it and consider-

ations relevant to it. This has led to uncertainty and unpredictability, and made satisfactory appellate review extremely difficult. The term, if retained, would have to be defined. This would be difficult and the policy issues are better dealt with in the ways proposed. Further, each possible rationale for the discretion can be satisfactorily met by one of the proposed rules.

The legislation includes the proposal first advanced in the Commission's Interim Report on Criminal Investigation (ALRC 2) that the police be required, except where impracticable, to sound record any interview or ensure the presence of an appropriate witness.

- ***Identification Evidence.*** Identification evidence has been recognised for some time as amongst the most unreliable and potentially dangerous categories of evidence. Unlike other unreliable or dangerous evidence such as hearsay evidence or evidence of bad character, however, the courts have not developed any rules to control the admissibility of identification evidence. Instead the courts have relied on giving warnings to juries as to the dangers of the evidence and on the general judicial discretion to exclude evidence where its prejudicial effect outweighs its probative value. The legislation in the report contains proposals developed from the Devlin Committee Report and the Australian Law Reform Commission's Report on Criminal Investigation. Important features to note are:

  - an exclusionary rule is created under which identification evidence will not be admissible unless an identification parade was held prior to the act of identification. This rule is subject to the exception that a parade need not be held where it would not have been reasonable to do so;

  - evidence of identification by police photographs (usually mugshots and therefore highly prejudicial) will not be admissible when it is led by the prosecution unless the photographs include those of people without criminal records or, where the accused is in custody, the photograph of the accused that was used was one taken after the accused was taken into custody;

  - where the suspect is in custody, the evidence of a subsequent photo identification will not be admissible unless it was not reasonable to hold an identification parade; and

  - special provisions are included on the directions that should be given to juries and to impose an obligation to direct an acquittal of an accused where there are no special circumstances in relation to the identification which would enhance its reliability and no other substantial evidence which implicates the accused. These proposals are based upon those advanced by the Devlin Committee.

- ***Privileges.*** There are several rules which prevent evidence of a confidential communication being disclosed in court or, more commonly, enable a person to prevent such evidence being given. The proposed legislation preserves those privileges which exist in all jurisdictions with some

modifications directed to removing deficiencies and addressing criticisms. One privilege that warrants specific mention in this brief summary is the privilege against self-incrimination. At common law, a witness can object to answering any question the answer to which may tend to incriminate him. This privilege has been subject to various modifications in different jurisdictions. In particular, in Western Australia, Tasmania and the Australian Capital Territory there is a certification procedure under which a judge may grant a certificate which either confers immunity from prosecution on the witness or renders any evidence that he may give inadmissible against him in any subsequent criminal proceeding. In recent years the issue has been raised as to whether the privilege should be abolished. This issue is considered in the Interim Report. The conclusion reached is that the privilege should be retained as a protection of the individual's personal freedom. It is, however, recognised that the privilege can deprive the courts of information relevant to the proceedings and thus make the fact finding task more difficult. The Commission has formed the view that the proper solution in light of the competing interests is to retain the privilege in a modified form. A modified version of the certification procedure operating in the Australian Capital Territory is proposed. Under this proposal a witness may claim the privilege but, if he is prepared to testify, the judge may issue a certificate which will prevent the evidence being admitted against him in subsequent legal proceedings. Unlike the ACT provision, the certificate will only be issued if the witness consents to the procedure. The decision will be for the witness, not for the judge.

The report also proposes the continuation of a client-lawyer privilege broadly along traditional lines. However, it is proposed that the communications to be protected must be made in the context of a professional relationship between the lawyer and client, or between the client's lawyers, and for the dominant purpose of obtaining or giving legal advice or assistance. The proposals have been framed in such a way as to ensure that evidence about concluded conveyancing and other property transactions will not be excluded. In addition, protection is given to communications between the lawyer or the client and third parties and documents prepared for the dominant purpose of obtaining or giving legal advice and assistance related to litigation.

A major issue in the area of privilege is whether privileges should be extended to relationships other than those presently protected. In particular, calls for such an extension have come from doctors, clergymen[26], those involved in peer review, psychiatrists, psychologists, social workers and journalists. It is often argued that lawyer-client relationships ought not to be regarded as more important than those involving other professionals and members of the public requiring their services. It is argued that these other important relationships should also be accorded the status of a specific privilege to protect the privacy of communications made in the course of them. However, the Commission's view is that the relationship of client and lawyer is distinguishable from other

26. Privileges exist in the Northern Territory, Tasmania and Victoria to protect the doctor–patient and priest–penitent relationships.

professional confidential relationships. There are significant differences between the relationship, for example, of the doctor and patient and the relationship of the lawyer and client. The relationship of the lawyer and client has a special significance because it is part of the functioning of the law itself: 'The communications which establish and arise out of that relationship are of their very nature of legal significance, something which would be coincidental in the case of other confidential relationships'.[27] The lawyer's office is the 'ante-room' of the courtroom. Whenever anyone consults a lawyer, litigation is always a possibility. At present confidentiality can be and is assumed. If there were no privilege, however, it would affect the way the lawyer provided legal services. He would be obliged to advise the client of the lack of privilege and the awareness of the absence of that confidentiality would inhibit the client. The client would try to decide what he should or should not tell his lawyer but would be all too frequently in a poor position to make that decision. It would be extremely difficult if not impossible to obtain satisfactory legal advice and assistance. Unlike the doctor, the lawyer is a potential witness in respect of all matters in which he acts for a client.

This is not to say, however, that there is not an important public interest in protecting the confidentiality of certain kinds of professional relationships. Relationships in which such people are professionally involved proceed on the basis that confidentiality will be maintained. A lack of confidentiality, for example, could stand in the way of effective therapy by psychiatrists, psychologists, social workers and school counsellors. In addition, it has been argued that the free dissemination of news could be hindered by the absence of protection of the journalist-source relationship. The competing public interests applicable to such confidential professional relationships, however, support a discretion to protect confidential communications rather than a privilege in all cases. In none of them is litigation always or even very frequently a likely eventuality. Further, complete confidentiality is not always a prerequisite to the formation or continuance of the relationship.

- ***Opinion Evidence.*** There has been much publicity relating to problems associated with the tendering of expert opinion testimony in the courts. Most of these problems are associated with pre-trial disclosure of information and lack of resources available to accused persons. They are outside the terms of reference. The proposals concern themselves with the admissibility of both lay and expert opinion testimony. They rationalise the existing law. Among other things the proposals abolish the rules that prevent an expert witness giving evidence on matters of common knowledge and expressing an opinion on an issue that is an ultimate issue in the trial. The law in these areas is extremely confused. It operates on occasions to prevent courts receiving evidence which could be of assistance. In relation to novel scientific evidence, consideration was given to employing a test that has emerged in the United States of America and has been used in some State Supreme Courts – a test requiring that the evidence relate to a recognised field of scientific investigation and that

27. Mr Justice Dawson in *Baker v Campbell* (1983) 57 ALJR 749, 781.

the theories and techniques applied have achieved acceptance amongst those practising in the field. This rule, known in America as the 'Frye test', has proved very difficult to apply in practice. For this reason, and because to adopt it would result in the courts constantly lagging many years behind scientific knowledge, it has not been proposed in the legislation.

- ***Evidence of Character and Conduct.*** The legislation proposed by the report is similar to the existing law in most areas. It does, however, attempt to give more guidance – particularly in the area of the admissibility of evidence of prior misconduct by the accused in criminal trials, and of evidence of the prior conduct of other persons whether in civil or criminal proceedings. An issue that emerged in formulating proposals for evidence of prior misconduct of the accused was whether it should be permissible to use such evidence to show a propensity or tendency on the part of the accused to behave in a particular way and to reason from that to the conclusion that he committed the crime in question – it being behaviour of a similar kind occurring in substantially similar circumstances. This would be allowed under the proposals in limited circumstances. There is a debate, however, as to whether it is permissible under existing law and one member of the Commission argues in the Report that it is not and should not be permitted. Another point to note about the recommendations in this area is that evidence of reputation, including sexual reputation, will generally not be admissible. Psychological research and experience supports the view that such evidence is of no value as a basis from which to draw conclusions as to how a person behaved on the occasion in question.

  Proposals are also advanced about evidence relevant to the credibility of witnesses. They tighten the control over cross-examination of witnesses on matters going only to their credibility but, having done so, relax slightly the rule that the cross-examiner is bound by the answers received. The proposal, in this regard, adopts the existing categories under which a witness' denials may be rebutted but adds a further category – knowingly or recklessly making a false representation at a time when under an obligation imposed by law to tell the truth. The formulation of the proposals in this area has been influenced considerably by the psychological research which indicates that, for the purpose of predicting behaviour, abstract character traits on their own are extremely poor indicators. What is required is information on the behaviour of the person concerned in similar circumstances. The research also shows that we tend to explain the behaviour of others (but not our own) on the basis of character traits which we assume continue to operate regardless of the context and that if we are aware of one bad character trait, we tend to attribute other bad traits to the particular individual. Another issue is the cross-examination of an accused with a view to attacking his credibility. On this an approach similar to that in New South Wales is adopted. The legislation provides that apart from questions directed to such things as motive to be untruthful, physical or mental disabilities or prior inconsistent statements, the accused may, by leave, be cross-examined by the prosecution on matters relevant to credibility only where the accused has given evidence tending to prove that a witness called by the

prosecution is untruthful and where the purpose of adducing that evidence was solely or mainly to impugn the credibility of that witness and that evidence has been admitted.

16. ***Competence and Compellability.*** In most jurisdictions, the spouse of an accused is not compellable as a witness for the prosecution except in relation to trials for certain specified offences. The unsatisfactory features of this approach are discussed in the Report. The offences listed in the legislation vary between States and Territories and the lists are arbitrary. The existing approach also fails to have any regard to the state of the marital relationship and the impact on the relationship of the spouse giving evidence against the other spouse. This has led to an alternative approach being taken in recent years in Victoria and South Australia under which the spouse of the accused is a compellable witness for the prosecution but may seek exemption from the trial judge. It is the Commission's view that this approach offers the best means of ensuring the achievement of the underlying policy objectives of protection of the family unit and the avoidance of undue hardship to the witness. The proposal extends the right to seek exemption to parents and children of the accused (as in the Victorian and South Australian legislation) and to the de facto spouse of the accused (as in the South Australian legislation). One member of the Commission has dissented from this proposal and argues that the right to seek exemption should extend to all 'intimate personal relationships'.

17. ***Sworn and Unsworn Evidence.*** The Commission advocates application of the option presently available in the Federal Court and in some States under which the witness chooses whether to swear a religious oath or make an affirmation. One member of the Commission, however, holds the view that the oath should be abolished. The Commission has also considered the right of the accused to make an unsworn statment. This right was originally provided at the time when the accused was unable to give sworn evidence. That is now no longer the case. The right to make an unsworn statement has come under frequent attack and has been abolished in Queensland, Western Australia and the Northern Territory. In Victoria and in South Australia, however, reports in recent years have recommended its retention.[28] The Commission is of the view that the right should be retained as it is still necessary for some accused persons, particularly Aboriginals. The draft legislation, however, addresses a number of the criticisms that may properly be made about the law and will prevent abuses that have occurred in the exercise of the right.

18. ***Interpreters.*** For many years, there has been a bias in law and often in practice against the use of interpreters in Court. This may have been appropriate in a community where the overwhelming majority of people spoke and understood the one language. In Australia, however:

28. Law Reform Commissioner of Victoria, Report No 11, *Unsworn Statements in Criminal Trials*, Government Printer, Melbourne, 1981 and Select Committee of the Legislative Council of South Australia, Final Report, *Unsworn Statements & Related Matters*, Government Printer, Adelaide, 1981.

> [t]wenty percent of our population were born overseas, and over half of these people came from non-English speaking countries. ..... More than one third of overseas born people regularly use a language other than English, and over 500 000 of them are estimated to suffer a severe disadvantage because of their lack of English.[29]

The existing law places the onus on a person wanting to use an intepreter to persuade the court that an interpreter is needed. There has often been a reluctance on the part of the courts to allow interpreters to be used. This reflects in part a misunderstanding of the processes of interpretation. They tend to be seen as purely mechanical when they are in fact truly interpretive. It tends to be assumed that if a person can carry on a conversation in English, he can do so for all purposes and in all circumstances. So even occasional assistance from an interpreter to a witness is prevented. The primary proposal reverses the onus under present law, enabling a witness to give evidence through an interpreter unless the court otherwise orders. An alternative proposal is included, which adds the qualification that a witness who gave evidence-in-chief without an interpreter but seeks an interpreter for cross-examination cannot do so without leave.

19. ***Corroboration.*** It is proposed to abolish the existing complex, technical, artificial, misleading and anomalous rules on corroboration. In their place is put forward a regime under which the trial judge must consider whether evidence comes within any of the broad categories of evidence listed in the legislation and, if so, whether it may be unreliable or the probative value of the evidence may be mis-estimated. If the judge considers the evidence to be such, he is obliged, unless there is a good reason for not doing so, to warn the jury as to the dangers attaching to that evidence. However, he will not be obliged to direct the jury to look for evidence independent of the suspect evidence to corroborate it; such a warning can be confusing and misleading. It distracts attention from the problem that the evidence in question may be unreliable or liable to mis-estimation. The fact that there is other evidence that corroborates it does not alter that fact nor does it make the evidence more reliable or less liable to mis-estimation.

20. ***Other Proposals.*** The draft legislation also includes proposals to:

- abolish the rule that evidence of a conviction may not be received in a civil trial when tendered as evidence of the facts on which it was based;
- relax the rules controlling the admissibility of admissions by persons employed or acting for a party;
- extend the power of a party to challenge the evidence of a witness called by that party, at present limited to witnesses who are 'hostile', to ensure that all evidence placed before the court will have been tested by at least one of the parties to the proceedings;
- rationalise and simplify the rules facilitating the authentication of documents;

29. Australian Council on Population and Ethnic Affairs, Discussion Paper, *Multiculturalism for all Australians: Our Developing Nationhood*, 1982.

- permit the court, in deciding whether a document is admissible, to draw inferences from a perusal of the document;
- abolish the rule under which a party calling for and inspecting a document in the possession of the other party could be compelled to tender the document in evidence;

and proposals that:

- a 'view' outside the courtroom may be used as evidence;
- formal proof not be required of proclamations and regulations or of facts which, while not matters of common knowledge, are not reasonably open to dispute; and
- the relevant courts in civil trials be given a power to dispense with the rules of evidence (such a power is already enjoyed by several courts including the Federal Court).

Future Consultation

21. The topics covered in the legislation are of far-reaching importance to the conduct of criminal and civil trials in federal and Territory courts. Proposals such as those relating to privileges, admissions and confessions, and identification evidence are of considerable significance to the investigation of crimes and the protection of civil liberties. It is proposed to engage in further consultation and to seek a response, in particular, on:

- the need for a comprehensive and uniform law of evidence for federal and Territory courts;
- the need for reform of the laws of evidence applying in those courts; and
- the proposals and alternatives advanced in the draft legislation contained in the Interim Report.

Public hearings will be held in all the capital cities in the latter part of 1985.