Briefing Note

Reform of Evidence Laws in NSW

by

Vicki Mullen

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CONTENTS

1 INTRODUCTION

In this briefing note, the moves to reform the law of evidence in NSW are discussed. A review of proposed and parallel reforms at a federal level has been undertaken due to the aim of the NSW Government to introduce evidence legislation that is (apart from a few minor technical differences) uniform with the final form of the Commonwealth evidence legislation.

A summary of the background and history of the NSW draft Evidence Bill 1993 and the Commonwealth Evidence Bill 1993 is given as well as an analysis of the arguments for and against the need to deal with the problems of the operation of the current evidence laws through comprehensive legislation.

The word 'evidence' may have a multitude of meanings depending on the context. For legal purposes however, 'evidence' generally refers to the body of law that governs the methods by which 'facts in issue at a trial' [1] are proved, on the balance of probabilities in order to establish liability in a civil trial and beyond reasonable doubt to establish guilt in a criminal trial.

The laws of evidence have also been more practically described as laws that,

> ... regulate who may give evidence and who may be required to do so, the manner in which evidence is given, what evidence may be received or excluded, how evidence is to be handled and considered once received, and what conclusions may be drawn from it.[2]

Evidence laws, however, cover a vast range of procedural, adjectival[3] and substantive law. It would be an impossible task to cover all issues in this note. Therefore, the proposed reforms of select issues have been discussed.

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1 PK Waight, CR Williams, *EVIDENCE Commentary and Materials*, 3rd ed, The Law Book Company Limited 1990, p 1.

2 Australian Law Reform Commission, Report No 26 (Interim), *Evidence*, 1985, Vol 1, p 4.

3 In its Interim Report of 1985, the Australian Law Reform Commission took on the difficult task of devising a definition of the 'laws of evidence' for the purpose of providing the parameters for the draft legislation. This was a necessary exercise as evidence laws make up an amorphous body of law, the definition of which depends on the commentator of the day. The suggested approach, as outlined on p 14 of the Interim Report, was that 'the laws of evidence' should be classified as part of adjectival law which deals with how people's rights and duties are treated and protected as opposed to substantive law which *defines* the rights and duties of people.

2 BACKGROUND TO AND HISTORY OF THE NSW DRAFT EVIDENCE BILL 1993

For nearly thirty years, there has been growing recognition of the need to develop legislation that would tackle the increasingly complex web of common law and piecemeal statute law covering the rules of evidence.

The common law applies in a relatively uniform manner across the state and federal jurisdictions, however each jurisdiction has developed its own evidence legislation which operates in conjunction with the common law principles (where specific principles are not directly overridden by legislation).

The need for reform in New South Wales was officially sanctioned in 1966 when the New South Wales Law Reform Commission ('NSWLRC') 'received a reference to "review the law of evidence in both civil and criminal cases"'.[4]

As a result of the reference, between 1973 and 1980 various reports and discussion papers were published by the NSWLRC which dealt with specific topics such as the rule against hearsay and the competence and compellability of witnesses. The recommendations of the 1973 report on business records were taken up with the insertion in 1976 of Part IIC in the *Evidence Act 1898* (NSW) which deals with the admissibility of business records as evidence.[5]

In July 1979 the Australian Law Reform Commission ('ALRC') received a reference 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[.][6]

At this time the NSWLRC decided to suspend any further work with respect to its reference relating to the law of evidence 'pending the outcome of the ALRC's inquiry and the outcome of its report.'[7]

In 1985, the ALRC published a detailed Interim Report in two volumes which included draft evidence legislation and commentary.

In the lead up to the Interim Report, sixteen research papers covering specific areas of evidence had been published which had been released to various interested individuals and

4 New South Wales Law Reform Commission, *Evidence Report*, June 1988, p 1.

5 Ibid.

6 Australian Law Reform Commission, Report No 38, *Evidence*, 1987, Terms of Reference.

7 NSWLRC, op cit note 4, p 2.

organisations in order to stimulate comment and discussion on the various aspects of evidence law.

> 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 consultation into the one piece of legislation. An object of the Interim Report is to seek responses to that legislation.[8]

In the Interim Report the ALRC dealt with the two major issues arising from its reference, namely,

- the overall need for reform as the current system is 'a highly complex body of law which is arcane even to most legal practitioners'[9], and

- the need for uniform laws of evidence to be applied by federal courts (the High Court, the Federal Court and the Family Court) and the courts of the Territories.

The current situation with respect to the evidence laws to be applied by federal courts is provided for by sections 79 and 80 of the *Judiciary Act 1903* (Cth). Section 79 states that the 'laws of each State or Territory, 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 or Territory in all cases to which they are applicable.' Section 80 further states that the common law of Australia, as modified by the Constitution and statute law is to govern all Courts exercising federal jurisdiction. The combination of these two sections can lead to anomalous results where, for example, two individuals accused of the same federal offence, could be subjected to different evidence laws, if for example, the Federal Court was sitting in Melbourne for one trial and Sydney for the other. This situation could have quite serious effects on the relative rights of the accused in a trial.

In 1987, the ALRC published its final report with a revised draft Evidence Bill (ALRC 38) in response to submissions received on the draft Bill in the Interim Report. The ALRC discovered that there was 'widespread acceptance of the concept and feasibility of a comprehensive federal Evidence Act.'[10]

In 1988, the NSWLRC, after calling for submissions from various experts at a State level according to its own reference, published a report which recommended that,

8 ALRC, op cit note 2, Vol 1, p xxxiii.

9 Ibid.

10 ALRC, op cit note 6, p xvi.

> ... uniformity should be sought in the evidence laws applied by all tribunals sitting in this State. To this end, the Commission has set aside many of the reservations it had with the ALRC draft bill in order to achieve a uniform system of law.[11]

In 1991, Evidence Bills were introduced in both the NSW and Commonwealth Parliaments and both were drafted on the basis of the recommendations of ALRC 38.

In October 1991, the Standing Committee of Attorneys-General supported the idea of substantially uniform evidence laws.

In 1993, an exposure draft Bill for NSW was released as a result of further consultations between NSW and the Commonwealth on the issue of uniformity. The Explanatory Note to the 1993 draft Bill explains that

> [t]he proposed Act is in most respects uniform with the proposed Evidence Act of the Commonwealth. The two Acts are drafted in identical terms except so far as the policies underlying the Acts differ, and except so far as minor drafting variations are required because one Act is a Commonwealth Act and one Act is a New South Wales Act.

The objects of the 1993 draft Bill, as described in the Explanatory Note 'are to reform and provide a comprehensive statement of the law of evidence to be applied in State courts and in certain other legal and administrative proceedings.'

In a press release from the NSW Attorney General's Department of 27 August 1993, the two main purposes of the draft Bill were identified as the simplification of the complex legal language of the law of evidence and access to modern technologies in the giving of evidence.

The 1993 draft Bill notably includes provisions relating to,

- the competency and compellability of witnesses;
- sworn and unsworn evidence;
- proof of contents of documents;
- admissibility of evidence including specific provisions with respect to the hearsay rule;
- opinion evidence;

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[11] NSWLRC, op cit note 4, p xiii.

- admissions;
- evidence of judgments and convictions;
- credibility and character;
- privileges;
- discretions to exclude evidence; and
- corroboration of evidence.

The Commonwealth Evidence Bill 1993 was introduced to the House of Representatives on 15 December 1993. In the Second Reading Speech, the Minister for Justice, the Honourable Duncan Kerr MP outlined the three main purposes of the Bill as being,

1) the need to 'for the first time provide an evidence law to apply in proceedings in Federal courts';

2) to provide 'a modern law of evidence for our nation' which would cut costs and unnecessary delays; and

3) to provide for a 'substantially uniform evidence law throughout Australia'[12].

On 9 February 1994, the Commonwealth Evidence Bill 1993 was referred to the Senate Standing Committee on Legal and Constitutional Affairs for report by 7 June 1994. The Committee received 38 submissions and held a public meeting in March 1994 to discuss the provisions of the Bill.[13] The report details the submissions and the criticisms and as a result has listed three general recommendations.

> **Recommendation 1:** The Committee recommends that the matters noted above be addressed by the government as soon as possible after appropriate consultation between the governments of the Commonwealth and New South Wales.
>
> **Recommendation 2:** The Committee recommends that there be a period of at least six months between the passing of the Bill and its coming into operation to enable the legal fraternity to familiarise itself with the Bill's provisions.

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[12] *Commonwealth Parliamentary Debates*, 15.12.93, p 4088.

[13] Report by the Senate Standing Committee on Legal and Constitutional Affairs, *Evidence Bill 1993, Interim Report*, June 1994, pp 1-2.

Recommendation 3: The Committee recommends that the legislation should be monitored after its enactment. This monitoring should be undertaken by a panel comprising representatives of relevant courts, legal practitioners and the Attorney-General's Department. The Committee will invite members of this monitoring panel to appear before the Committee in 1995 to report on any problems encountered following the implementation of the legislation.[14]

As at 19 October 1994, the Commonwealth Bill is still before the House of Representatives. On the basis of the submissions received by the Senate Standing Committee, it is possible that amendments will be made to the Bill before it is passed by the House of Representatives and the Senate. This has implications for the introduction of the NSW Evidence Bill. On 14 April 1994, the Attorney General, the Honourable JP Hannaford MLC was asked why the introduction of the Bill had been delayed past 1993. The Attorney General responded by saying that, 'it would not be appropriate for this Parliament to deal with the bill until we know the final form of the Commonwealth legislation, particularly if we are trying to achieve uniform legislation.'[15]

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[14] Ibid, pp 60-61.

[15] *NSWPD*, 14.4.94, p 1141.

3 WHY REFORM?

The extensive consultation processes that have been employed in the last decade have spurred the debate about reform. The push for review at the State and federal levels has been motivated by two common factors, namely, the clear need to tidy up and simplify the existing common and statute law in a modern context and the need for uniformity of evidence laws applied in courts exercising the same jurisdictions. These two issues are not necessarily mutually exclusive. For example, the increased recognition for the need for uniformity is primarily a result of the modern creation of the Federal Court and the Family Court and the relatively recent introduction of the cross-vesting scheme.

The need for uniformity between federal courts, and federal and State courts

As mentioned above, at a federal level, the creation of the Family Court and the Federal Court in 1976 has provided compelling practical reasons for the need for uniform evidence laws to be applied across the board in federal courts (including the High Court of Australia) irrespective of where one of the federal courts is sitting. In addition, State and federal courts, in certain circumstances may now exercise each other's jurisdiction.

Section 77 of *The Constitution* enables the Federal Parliament to invest any court of a State with federal jurisdiction. Section 39 of the *Judiciary Act 1903* (Cth) invests State courts with federal jurisdiction in all matters in which the High Court has original jurisdiction except with respect to those matters in which the jurisdiction of the High Court is exclusive, as outlined in section 38 of the same Act. In addition, cross-vesting legislation enacted by the Federal and State Parliaments[16], which came into operation in 1988, enables federal courts (The Federal Court and the Family Court) and State Supreme Courts to exercise each other's jurisdiction with respect to civil matters. This means that the Supreme Court of NSW may exercise, where appropriate, the civil jurisdiction of the Federal Court and the Family Court and vice versa. The Supreme Court of NSW may also exercise the civil jurisdiction of any other State Supreme Court under the cross-vesting legislation.

If uniform evidence laws were only adopted between federal courts and not also between federal and State courts, this could *also* lead to the anomalous situation of parties to similar civil cases being subjected to different laws of evidence if one case was being heard by a federal court and another case was being heard by a State Supreme Court, or if two similar cases were being heard by different State Supreme Courts.

It seems that for true uniformity to be achieved in the application of evidence laws across the nation, uniform legislation needs to be enacted at both federal and State levels. Uniform legislation would also ease the problem of 'forum shopping' whereby a 'plaintiff may be able to choose the jurisdiction for commencing an action in which the laws of

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[16] See for example the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW).

evidence seem most favourable to the claim.'[17]

From a federal perspective, the issue has been encapsulated in the Interim Report of the ALRC as follows.

> The issue is whether, if there must be some disuniformity, 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.[18]

It is further stated in the Interim Report that the

> ... Judiciary Act solution of applying the laws of evidence in the State or Territory in which a federal court is sitting may have been reasonably satisfactory when the only federal court was the High Court, a court whose major role has been an appellate one - in the course of which evidence is rarely given. The creation of two new federal courts - the Family Court and the Federal Court - each having a substantial and increasing volume of trial litigation and each administering national laws has made it important to consider the suitability of that approach.[19]

The specific reasons advanced for the preference for a comprehensive uniform law to be applied by all federal courts are outlined in the Interim Report. These reasons, briefly are,

- the need for equal application of the law to all cases brought before a federal court, irrespective of the location of the trial;
- the avoidance of the application of different laws for a particular trial, for example where the examination of witnesses may take place in different states and territories;
- to prevent the non-transfer of proceedings (where the transfer may be expedient for matters of convenience) and the transfer of proceedings ('forum shopping') for the purposes of having a case dealt with according to favourable evidence laws; and

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[17] NSWLRC, op cit note 4, p 6.

[18] ALRC, op cit note 2, Vol 1, p xxxii.

[19] Ibid, p 4.

- the avoidance of the practical difficulties for judges and juries in having to adjust to a number of different laws which may be unfamiliar.[20]

The Interim Report also recognises that the differing evidence laws affect the business community with respect to the different requirements for record-keeping and the admissibility of certain types of records such as electronically stored information and other non-traditional records such as microfilm. The point is made that businesses must currently 'devise systems which can produce records which are admissible under any of the diverse legislative provisions.'[21]

Problems and uncertainties with respect to the application of sections 79 and 80 *Judiciary Act 1903* have also been identified as a reason for uniform legislation between federal courts.[22]

The Interim Report also outlined the arguments against comprehensive uniform legislation such as the burden on legal practitioners in having to adapt to a new set of laws, the prevention of the natural development of the law of evidence with the 'ossification' of the law and the impossibility of simplifying the law due to the inevitable development of case law concerning the interpretation of a new legislative scheme.[23]

Nevertheless, the ALRC in its Interim Report of 1985 concluded in favour of comprehensive uniform evidence laws to be applied by all federal courts. At p 116 of this Report, the primary reason for reform is stated as the undesirable fact that under the current system differing rules may lead to different results 'in the application of national legislation...[as a] result of the irrelevant factor of where a case is commenced.'

The final report of the ALRC of 1987 (ALRC 38) reiterated the conclusions of the Interim Report as the 'responses to the Interim Report generally confirmed the Commission's views that there is a need for uniform comprehensive reforming legislation.'[24] More specifically,

> [t]here was general acceptance of the proposition that there should be uniform laws of evidence operating in the federal and Territory courts. Some concerns, however, were raised by some commentators. They relate to the desirability of uniform laws of evidence in *all* courts in Australia. They do not detract from the desirability of having uniform laws of

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[20] Ibid, pp 110-111.

[21] Ibid, p 111.

[22] Ibid, pp 111-114.

[23] Ibid, pp 115-118.

[24] ALRC, op cit note 6, p 7.

evidence in *at least* the Federal and territory courts.[25]

The ALRC suggested that the best way to deal with the problems of the evidence laws to be applied by State courts exercising federal jurisdiction (as the ALRC's Terms of Reference did not extend to this question) was to

> ... implement reforms in federal and Territory courts and monitor their operation. Only after that...should the attempt be made to achieve uniformity throughout Australia.[26]

The NSWLRC in its report of 1988 supported the conclusions of the ALRC and recommended at page 4 that the 'bulk of the ALRC's proposals be adopted in New South Wales.' The NSWLRC expressly supported the uniform application of evidence laws between State *and* federal courts in light of the (at the time) pending cross-vesting legislation and the fact that the parties to a case and the legal practitioners 'should not be confused and inconvenienced by a need to take account of two separate sets of rules in one State.'[27]

However, the quest for uniformity, has, to a certain extent been questioned. John Doyle QC (the current Solicitor-General for South Australia) has put forward an argument for *substantial* uniformity between State jurisdictions as opposed to complete uniformity, in a paper delivered at the conference 'Evidence and Procedure in a Federation' held in Melbourne in April 1992.[28] In his paper 'Uniform Evidence Legislation', Doyle outlines various factors such as the increased mobility of lawyers between jurisdictions and the increase of forum shopping in civil matters as contributing to the need for 'substantial uniformity in the law of evidence around Australia.' However, he states that complete uniformity is not a necessary goal in Australia and that,

> [o]ne of the merits of having States is that different communities can make their own choices. ... Diversity has its merits. ... So, I accept the case for substantial uniformity, and in particular in civil litigation. More than that is likely to be unachievable and probably unnecessary.[29]

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25 Ibid, p 10.

26 Ibid, p 11.

27 NSWLRC, op cit note 4, pp 5-6.

28 Zariski, A (Ed), *Evidence and Procedure in a Federation*, Proceedings of a Conference Sponsored by the Australian Institute of Judicial Administration and the Federal Litigation Section of the Law Council of Australia, The Law Book Company Limited, 1993.

29 Ibid, p 36.

With respect to state criminal offences, he takes the view that in a federation, local differences are both to expected and acceptable.[30]

However, Doyle accepts the need to have uniformity in relation to federal criminal offences due to the problem of individuals charged with the same federal offence being subjected to different laws of evidence which can 'readily affect the outcome of a case'.[31]

Doyle also accepts that with the introduction of the cross-vesting legislation, the need for uniform evidence laws where civil cases are concerned has increased in order to reflect the reality that the civil jurisdiction of the superior courts in Australia is developing towards becoming a de facto single jurisdiction.

However, if uniform evidence laws were adopted between State Supreme Courts and the Federal Court and the Family Court for the purpose of facilitating the spirit of the cross-vesting legislation in civil trials, then it would seem that all State courts should adopt the same evidence laws as a matter of convenience, whether the trial is civil or criminal. The operation of uniform evidence laws only between State Supreme Courts and the Federal and Family Courts in civil cases would lead to the operation of two separate bodies of evidence laws within each State. Which evidence laws should apply at a State level would depend on whether the trial was civil or criminal and whether the trial was before the Supreme Court or the lower Courts.

The case for uniform evidence laws across the nation in all jurisdictions would be further supported by the current push for the development of a national market for legal services and the disintegration of restrictive trade practices within the legal profession. It should also be noted that the push for uniform criminal laws across the nation is growing which would add further weight to the need for uniform evidence laws to be applied nationally.[32] In 1991, discussions concerning a national criminal code were already underway.[33]

The NSWLRC stated its position with respect to the uniformity of evidence laws between State and federal courts as follows.

> Should the federal evidence law be changed to require uniformity among federal courts, different laws may apply in different tribunals sitting in one State or Territory. We consider this to be equally undesirable. The federal and State tribunals sitting in New South Wales should all apply the same rules of evidence. Parties and practitioners should not be confused and

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30 Ibid, p 40.

31 Ibid, p 39.

32 'PM launches push for uniform criminal laws', *The Australian*, 23.8.94.

33 'Uniform criminal code on agenda', *The Australian*, 10.5.91.

inconvenienced by a need to take account of two separate sets of rules in one State.[34]

The need for substantive reform and comprehensive legislation

Factors identified with the need for reform of the content of the laws of evidence generally stem from the archaic, complicated and uncertain nature of the current evidence laws. Considerations such as cost and time, modern technologies, changes in societal attitudes and matters of practice all contribute to the general acceptance of the need for reform.

In its Interim Report of 1985, the ALRC recognised the following problems with the current laws.

- Legislation enacted to date with respect to the admission of evidence which is information captured in a variety of mediums other than original paper documents has developed in an ad hoc manner and 'at no time was an attempt made to deal with the issues in a systematic fashion.'[35]

- The expectations and beliefs of Australian society have markedly changed in recent times. Some examples are given.

  It is commonly thought that the numbers of people who hold religious beliefs has been declining for some time. Should the religious oath, which may have been appropriate for an 18th century English community, be retained? Is it practical to retain a religious oath in our multicultural society? The 'de facto' relationship has assumed a significance in our society - should the rules which exempt one spouse from giving evidence against the other extend to 'de facto' spouses? Should it extend to other relationships?[36]

Indeed, should a homosexual spouse be able to claim an exemption from giving evidence against his or her partner?

The Interim Report also recognises the time and cost involved with 'strict adherence to "the best evidence" rule [which] requires production of the original document'[37] and other matters concerning the admissibility of evidence such as the hearsay rule and corroboration of evidence.

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[34] NSWLRC, op cit note 4, p 5-6.

[35] ALRC, op cit note 2, Vol 1, p 4.

[36] Ibid, pp 4-5.

[37] Ibid, p 5.

The argument for comprehensive legislation has been based on the need to simplify and organise the law, to remove uncertainties in the law, to make the law more accessible and thereby aid equality before the law.[38]

There has, however, been criticism of the need for comprehensive reform on the basis that the current evidence laws work well enough. At pp 121 - 123 of the Interim Report, the ALRC examines this assertion and concludes that the perception that there are no major problems in practice springs from the fact that the law works because difficulties and uncertainties are ignored and the practice of waiving certain rules of evidence in order to facilitate the admission of evidence is common.

> If this description of what happens in practice is correct, it is in itself an indictment of existing law. It suggests that it has been found that the law can only operate satisfactorily if its detail is forgotten, removed or waived. There has been a de facto reform of the law of evidence. It is a method of 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...[39]

The ALRC supported its recommendation for comprehensive reform through a very detailed analysis of the difficulties and uncertainties of the laws of evidence, as defined at pp 13-23 of the Interim Report.

The final report of the ALRC in 1987, reiterated support for the conclusions of the Interim Report with respect to the issue of substantive and comprehensive reform.

The report of the NSWLRC in 1988 also supported the need for substantive and comprehensive reform on the basis that the current laws are ad hoc in nature, excessively technical and that in many cases they don't reflect modern developments in technology and societal attitudes.[40]

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[38] Ibid, pp 108-109.

[39] Ibid, p 122.

[40] NSWLRC, op cit note 4, pp 5-9.

4 PROPOSED REFORMS OF SELECT AREAS OF EVIDENCE LAW

The rule against hearsay

'Essentially the rule against hearsay prohibits witnesses repeating out-of-court statements made by others in order to *establish the truth* (emphasis added) of those statements.'[41]

Waight cites four justifications for the rule from the judgment of Lord Normand in *Teper v R* [1952] AC 480 (at 486), namely, hearsay is not the best evidence, hearsay evidence is not delivered on oath, the demeanour of the maker of the statement cannot be observed and the maker of the statement cannot be cross-examined.[42]

These have obviously been important considerations when considering the admissibility of potentially unreliable and unexaminable evidence and have traditionally maintained the exclusion of hearsay evidence at common law.

The potential value of hearsay evidence, even though it may not technically be the best evidence, has however, been recognised. As a result, common law and statute law exceptions have developed to the rule against hearsay so that categories of hearsay evidence that for various reasons are considered to be reliable evidence, may be admissible. Common law exceptions include,

- certain statements by persons since deceased including declarations against interest and declarations made in the course of duty and dying declarations in a trial for the murder or manslaughter of the maker of the statement;
- statements in public documents;
- admissions in civil cases;
- statements concerning the maker's contemporaneous state of mind, emotion or physical condition;[43]
- admissions and confessions of the accused (if voluntary); and
- res gestae evidence, being evidence that is very closely related, for example, in time or place, to the fact(s) in issue (however this is a contentious exception and one for which a comprehensive definition is difficult to find). Waight notes that two principles are generally claimed to be heads of res gestae, namely, incidents in the transaction and spontaneous statements made by participants in or observers

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[41] Waight, op cit note 1, p 643.

[42] Ibid, p 644.

[43] Ibid, pp 695-721.

to an event in issue.[44]

Statutory exceptions are primarily to do with the admission of documentary evidence. For example in NSW, Part 2A of the *Evidence Act 1898*, which was inserted in 1954, deals with the admissibility of documentary evidence as to facts in issue in civil proceedings and Part 2C, which was inserted in 1976, deals with the admissibility of business records.[45]

At best, the doctrine of hearsay is fraught with uncertainties as to its current operation and its future in terms of the parameters of the exclusionary rule at common law and the chipping away that has occurred through statute law. The call for reform has been a strong one. Criticisms have been voiced along the lines that '...adequate trial preparation [is] difficult, reliable and highly probative evidence is often excluded, and the consequences for the litigants involved can be far reaching.'[46]

A detailed analysis is given in the Interim Report of the ALRC of the inadequacies of the body of law concerning the hearsay rule. Criticisms noted are many and varied and include the following:

- the exclusion of relevant evidence of substantial probative value;
- the complexity, technicality, anomalies and artificiality of the exceptions to the rule against hearsay;
- the problems associated with evidence tendered for a non-hearsay purpose;
- the lack of understanding of the law;
- the inflexibility of the law; and

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[44] Ibid, p 876.

[45] See pp 63-64 (Vol 1) of the Interim Report of the ALRC for an outline of the differences between the various jurisdictions with respect to the admission of business records under statute law.

[46] Arenson, KJ, 'Unravelling the Hearsay Riddle: A Novel Approach' (1994) 16 *The Sydney Law Review* 342. This article examines the current state of chaos surrounding the exact definition of hearsay evidence through an analysis of recent and somewhat controversial cases before superior courts. One of the main problems seems to be the confusion surrounding the distinction between the admission of an out-of-court statement for purposes other than to establish the truth of the statement (in which case the statement is not excluded as hearsay) and hearsay evidence (out-of-court statements which would be tendered as evidence to establish the truth of the statement). The fine line between the admission of out-of-court statements for other purposes and hearsay evidence is demonstrated in this article to be very fine indeed.

See also, McGinley, GPJ and Waye, V, 'Implied Assertions and the Hearsay Prohibition', (1993) 67 *The Australian Law Journal* 657, for an analysis of the problems associated with the distinction drawn between implied and direct assertions and Cato, C, 'Verbal Acts, Res Gestae and Hearsay: A Suggestion for Reform' (1993) 5 *Bond Law Review* 72.

- the increase in the cost of a trial where the maker of a statement must be called to testify.[47]

The technical and varied statutory provisions relating to the admission of documentary evidence between the jurisdictions are also criticised for a number of reasons including the cost and time involved for businesses across Australia in keeping records that would comply with all schemes.[48]

At page 373 of the Interim Report, the ALRC states that the proposals for the reform of the hearsay rule are to

> affirm and continue a hearsay rule, which, as at present, will exclude evidence that is relevant and otherwise admissible but to provide revised and simpler categories of exceptions which, if established, would entitle hearsay evidence to be admitted in court. ... The proposals distinguish between firsthand hearsay and more remote hearsay. A very restrictive approach is taken for the latter because the negative impact of such evidence generally predominates.[49]

Part 3.2 of the NSW draft Evidence Bill 1993 deals with hearsay evidence and operates by generally prohibiting the use of hearsay evidence as well as providing for a number of specific exceptions restricted to the concept of 'first-hand' hearsay as well as other practical exceptions such as business records.

'First-hand' hearsay is confined in clause 62(1) to a 'previous representation' that was made by a person who had personal knowledge of an asserted fact. Subclause (2) outlines the nature of personal knowledge as follows:

> A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

The note to clause 59 of the draft Bill (which generally excludes hearsay evidence) gives a concise summary of the specific exceptions to that clause as follows:

- evidence relevant for a non-hearsay purpose (clause 60)

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[47] ALRC, op cit note 2, Vol 1, pp 167-174.

[48] Ibid, pp 174-190.

[49] Ibid, p 373.

- first-hand hearsay:
  - civil proceedings, if the maker of the representation is unavailable (clause 63) or available (clause 64);
  - criminal proceedings, if the maker of the representation is unavailable (clause 65) or available (clause 66);
- business records (clause 69);
- tags and labels (clause 70);
- telecommunications (clause 71);
- marriage, family history or family relationships (clause 72);
- public or general rights (clause 73);
- use of evidence in interlocutory proceedings (clause 74);
- admissions (clause 80);
- representations about employment or authority (clause 87);
- representations about common purpose (clause 87);
- some exceptions to the rule excluding evidence of judgments and convictions (clause 91);
- good character and expert opinion about accused persons (clauses 109 and 110).

It is also noted that other provisions of the (proposed) Act, or of other laws, may operate as further exceptions.

Clause 8 of the draft Bill states that the (proposed) Act is to operate to the exclusion of the operation of the principles and rules of the common law and equity that apply in relation to the proceeding, except as otherwise provided by the (proposed) Act (see in particular subclause (2) of clause 8). The operation of the common law is not preserved in any of the provisions dealing with the hearsay rule, except to the limited extent provided for in clause 8(2). As a result, the common law exceptions outlined above, if not specifically made an exception under the Bill, would cease to have effect. The current statutory exceptions in NSW would no longer have effect as the *Evidence Act 1898* would be repealed (subject to transitional provisions) once the (proposed) Act commenced.

The provisions dealing with hearsay evidence in the draft NSW Evidence Bill 1993 are substantially the same but not identical to those of the Commonwealth Evidence Bill 1993. However, as it has been proposed to introduce Evidence legislation in NSW that is uniform with the Commonwealth legislation, the provisions of the Commonwealth Bill could be read in conjunction with those of the NSW draft Evidence Bill.

It should be noted that an alternative approach was proposed to the recommendations of the ALRC with respect to hearsay evidence. Justice Kirby (President of the NSW Court of Appeal and former Chairman and member of the Evidence Division of the ALRC), who believed that the rules approach was too complex, suggested that a discretionary approach should be developed where judicial officers 'could admit evidence, although hearsay, after considering certain clearly stated conditions of a general character' such as relevance, convenience, justice and countervailing reasons of law or public policy. The advantages of such an approach were listed as including flexibility and simplicity. The proposal was however rejected due to a number of perceived disadvantages including potential inequality before the law, lack of certainty and predictability and the potential for delay and interruption.[50]

A further criticism has been made of the attempt to draft detailed provisions in legislation dealing with the hearsay rule on the basis that this approach is 'too rigid and inflexible'.

> It must be recognised that the hearsay rule in its current form cannot be logically applied to all statements. To those statements which the rule can be applied, the rule operates in an overly restrictive manner and is not necessarily effective in filtering out unreliable evidence. A rational way to tackle this is to create some sort of general exception whereby reliability is the sole criteria that needs to be fulfilled.[51]

It is likely that the same criticisms would be levied against this proposal as they have been for the proposal of Justice Kirby.

Oaths and affirmations

Due to the wide variation of religious practices in Australia and the number of people who have no belief in a god, deity or spiritual force, the need for and the relevance of the religious oath to be taken before giving evidence has been questioned. In NSW, parties giving evidence in a court must give *sworn* evidence either on oath or by affirmation or

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[50] For further detail as to this proposal, see pp 399-404 of Volume 1 of the Interim Report of 1985 of the ALRC.

[51] Lim, YF, 'A Logical View of the Hearsay Rule', (1994) 68(10) *The Australian Law Journal* 724 at 729.

declaration (see Parts 3 and 6 of the *Oaths Act 1900*).[52]

Section 13 of the *Oaths Act* enables a witness or any person 'having to make a statement in any information, complaint, or proceeding in any Court or before any justice ...' to make a declaration or solemn affirmation (as set out in the Schedules to the Act) in lieu of an oath. The legislation does not require that specific reasons be given for objecting to the giving of evidence under oath.

In its Interim Report of 1985, the ALRC stated that the swearing of witnesses was important as a 'symbol of the attempt by the trial system to make decisions on the basis of accurate fact-finding.'[53]

The argument for the abolition of the religious oath is primarily based on the fact that, the oath 'offers no greater security [of truth] than the affirmation.' Conversely, the argument to retain the oath is based on the belief that a religious oath would still encourage certain people to tell the truth.[54]

The ALRC concluded that a witness should have a choice between a religious oath and an affirmation.[55] This conclusion was supported in the final report of the ALRC in 1987 with the two options being treated as equal options in the draft legislation so the witness giving evidence on affirmation is not discriminated against and the evidence devalued.[56]

Clause 21 of the NSW draft Evidence Bill enables a witness in a proceeding to either take an oath or make an affirmation before giving evidence. 'Proceeding' is defined in the Dictionary to the Bill as a proceeding to which the Bill applies. Clause 4 of the draft Bill states that the (proposed) Act applies in relation to all proceedings in a court. Subclause (4) importantly states that an affirmation is to have the same effect for all purposes as an oath.

Clause 23 states that a witness has a right to choose between an oath or an affirmation. The court must inform the person of this choice and if the person refuses to choose, the court may direct the witness to make an affirmation. The court may also direct the witness to choose to make an affirmation if 'it is not reasonably practicable for the person to take an appropriate oath.'

If a witness chooses to take an oath, clause 24 provides that a religious text is not

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52 The right of the accused in a criminal trial to give unsworn evidence or make an unsworn statement has been abolished in NSW from 10 June 1994 when the *Courts Legislation (Unsworn Evidence) Amendment Act 1994* was proclaimed to commence.

53 ALRC, op cit note 2, Vol 1, p 306.

54 Ibid.

55 Ibid, p 311.

56 ALRC, op cit note 6, p 45.

necessary and that, according to subclause (2), an oath is effective even if the person who took it,

(a) did not have a religious belief or did not have a religious belief of a particular kind; or

(b) did not understand the nature and consequences of the oath.

The religious oath would be retained as an option and the affirmation would be expressly given the same status and value as the oath as a method of giving sworn evidence. These provisions are in line with the recommendations of the ALRC. The incompetency at common law of a witness to give evidence on oath (see below) if the witness does not understand the nature of the oath, would be abolished according to clause 24. The key feature of these provisions is the *right to choose* between an oath or an affirmation when giving evidence in a court proceeding.

The oath or affirmation is to be given in the appropriate form in Schedule 1 to the draft Bill or in a similar form. The form of the oath to be taken by a witness given in Schedule 1 would be as follows:

> I swear (*or the person taking the oath may promise*) by Almighty God *(or the person may name a god recognised by his or her religion)* that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

The form of the affirmation to be given by the witness given in Schedule 1 would be as follows:

> I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

The provisions of the NSW draft Evidence Bill provide a simple and flexible approach to the swearing of evidence which allows for the widely varied religious practices in Australia and enables a person with no religious beliefs to give sworn evidence on an equal footing with evidence given under oath. It should be noted that section 13 of the *Oaths Act* (discussed above) would continue to apply if the draft Evidence Bill came into force, which would mean that a witness would still have the option of giving evidence by making a declaration or affirmation in lieu of an oath under this Act.

Competence and compellability of witnesses

A witness or any other party in a trial giving evidence before the court must be competent. In the Interim Report of the ALRC, the two levels of competence are

discussed, namely psychological and physical competence.[57] Psychological competence at common law is based on the ability of the party giving evidence to understand the nature of giving evidence on oath.[58] A party must also be physically competent to deliver evidence.

A party may also be compelled, or required by law to give evidence. In other words, in most cases a party with relevant evidence to give may have no choice as to whether or not they give evidence before the court. With respect to the compellability of witnesses in a trial, there are two very strong, yet competing public policy issues involved in exempting a party from giving evidence. It is in the public interest to have as much of the relevant evidence available to the court as possible. On the other hand, there is clear recognition of the disturbance to family life and other relationships that may be caused when a party is compelled to give evidence in the trial of someone with whom they share a very close personal relationship.[59] A further issue arises as to who should be able to have the benefit of an exemption from being compellable as a witness in certain circumstances. Should homosexual spouses, best friends, siblings, grandparents and cousins have the benefit of non-compellability?[60]

The current situation in NSW with respect to the competence and compellability of a witness is somewhat disjointed.

Section 6 of the *Evidence Act 1898* of NSW provides that,

> In any legal proceeding in which witnesses are compellable to give evidence, every person offered as a witness and competent to give evidence shall, except as hereinafter provided, be compellable to give evidence.

Exceptions to section 6 provided under this Act are limited to,

- the privilege against self-incrimination (section 9);
- the privilege against the disclosure by a member of the clergy of religious confessions (section 10); and
- the privilege against the disclosure of marital communications between husband and wife (section 11).

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[57] ALRC, op cit note 2, Vol 1, p 286.

[58] Ibid, Vol 2 p 99.

[59] Ibid, Vol 1 p 295.

[60] For more detail regarding this issue, please refer to pp 291-300 of Volume 1 of the Interim Report of the ALRC.

At common law, the accused in a criminal trial was not a competent witness.[61] However, according to section 407 of the *Crimes Act 1900* of NSW, the accused and the spouse of the accused are competent witnesses but not compellable except where the offence charged is under an Act by which the spouse of the accused is made a compellable witness or where the offence charged is under certain provisions of the *Children (Care and Protection) Act 1987*. The spouse of the accused may also be a compellable witness (including a de facto spouse) under section 407AA in domestic violence and child abuse cases. There is, however, a judicial discretion under subsection (4) to excuse a spouse from giving evidence in these cases if the application to be excused is made according to the free will of the spouse, the evidence to be given is relatively unimportant in terms of establishing certain facts and the offence with which the accused is charged is of a minor nature.

The *Oaths Act 1900* deals with evidence given by a child (defined in section 32 to be a person under the age of 12 years). Section 33 of the same Act enables a child giving evidence as a witness in a court to make a declaration instead of an oath when giving such evidence if the court is satisfied that the child is not competent to take an oath. The court must inform the child of the importance of telling the truth and if the child does not understand the difference between the truth and a lie, the evidence is not to be received. These sections of the *Oaths Act* enable children to be competent witnesses, even though they may not appreciate the importance of a religious oath.

Any witness who objects to taking an oath or is objected to as incompetent to take an oath, may still be a competent witness if a declaration or affirmation is made instead under section 13 of the *Oaths Act*.

Division 1 of Part 2.1 of the NSW draft Evidence Bill (clauses 11-20) deals with the competence and compellability of witnesses and brings together many of the 'scattered' provisions in this area.

Clause 11 states that except as otherwise provided by this Act,

(a) every person is competent to give evidence; and

(b) a person who is competent to give evidence about a fact is compellable to give that evidence.

Clause 12(1) states that a 'person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give sworn evidence.' While not specifically relevant to children, clause 12 would essentially replace section 33 of the *Oaths Act 1900* by providing that a person who is not competent to give sworn evidence, may give unsworn evidence if, according to subclause (2),

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[61] Waight, op cit note 1, p 81.

(a) the court is satisfied that the person understands the difference between the truth and a lie; and

(b) the court tells the person that it is important to tell the truth; and

(c) the person indicates, by responding appropriately when asked, that he or she will not tell lies in the proceeding.

Sections 33 and 34 of the *Oaths Act 1900* would be repealed by the draft Evidence (Consequential Provisions) Bill 1993.

Clause 12(3) provides that a 'person who is incapable of giving a rational reply to a question about a fact is not competent to give evidence about the fact, but may be competent to give evidence about other facts.' 'Rational' is not defined.

Clause 12(4) provides that a person is not competent to give evidence if they are incapable of hearing or understanding or of communicating a reply, and such incapacity cannot be overcome. Therefore, it can be presumed that, for example, a deaf person would be able to give evidence if a person with the ability to communicate in sign language could be used as an interpreter, or if the deaf person could lip read. However, clause 13 provides that a person is not compellable if the court is satisfied that

(a) substantial cost or delay would be incurred in ensuring that the person would be capable of hearing or understanding, or of communicating replies to, questions on that matter; and

(b) adequate evidence on that matter has been given, or will be able to be given, from one or more other persons or sources.

Clause 14 deals with the compellability of the Sovereign and others and clause 15 deals with the competence and compellability of judges and jurors.

Clause 16 of the draft Evidence Bill states that a defendant is not competent to give evidence for the prosecution and an associated defendant is not compellable in a criminal proceeding unless the associated defendant is being tried separately from the defendant.

Clause 17 provides that a spouse, de facto spouse, parent (including adoptive and natural parents) or child (including an adopted child and an ex-nuptial child) of a defendant may object to being required to give evidence for the prosecution in a criminal trial.

The balance between the two competing policy issues outlined above has been struck, with protection being extended to specific family relationships only in criminal trials. Subclause (6) of clause 17 expressly recognises the potential harm that may be caused by compelling close family members to give evidence in criminal trials. It states,

A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:

(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant concerned, if the person gives the evidence; and

(b) the nature and extent of that harm outweighs the desirability of having the evidence given.

However, under subclause (7) the court must take into account (without limiting the effect of subclause (6)) certain matters such as the nature and gravity of the offence, the importance of the evidence and the nature of the relationship between the defendant and the person.

Clause 18 provides exceptions to clause 17 so that the spouse, de facto spouse or parent or child of a defendant may be compelled to give evidence as a witness in proceedings for an offence against certain sections of the *Children (Care and Protection) Act 1987* or an offence referred to in section 407AA of the *Crimes Act 1900* (discussed above). Section 407 of the *Crimes Act 1900* (discussed above) would be repealed according to Schedule 1 of the draft Evidence (Consequential Provisions) Bill 1993.

The *Evidence Act 1898* (discussed above) would also be repealed according to clause 3 of the draft Evidence (Consequential Provisions) Bill 1993 and Part 3.10 of the draft Evidence Bill would deal with the various privileges available against giving evidence such as client legal privilege, the privilege against the disclosure of religious communications with a member of the clergy and the privilege against self-incrimination.

The draft provisions concerning the competence and compellability of witnesses tidy up this area and enable unsworn evidence to be given where the witness does not understand the obligation to give truthful evidence, but does however understand the difference between the truth and a lie.

5 CONCLUSION

The final stage of the development of comprehensive and uniform laws to be applied at a federal level and in NSW commenced with a draft exposure Evidence Bill being released in 1993 in NSW and an Evidence Bill being introduced into the House of Representatives in December 1993. The development has taken nearly 30 years with the recognition in NSW in 1966 of the need for reform of the disjointed and highly complex body of common and statute law in the area of evidence.

A vast amount of money, time and energy has been invested, particularly in the last 10 years, in the search for the most simple, yet comprehensive approach to reform without oversimplifying an area of law, which by its very nature is detailed and technical.

The benefits of having comprehensive legislation, even though it will no doubt have its teething and ongoing problems, are obvious. The NSW draft Bill and the Commonwealth Bill bring together into the one document, a modern statement of a crucial body of law that is otherwise archaic, haphazard and unpredictable in its development. The Evidence legislation should make the law easier to access and understand. This will hopefully ease the time and cost problems associated with trials and thereby benefit individual parties as well as the public at large if some of the burden on the court system can be eased.

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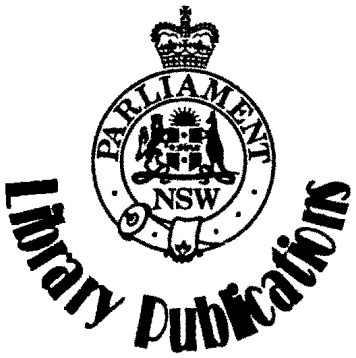

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