Briefing Note

NSW Parliamentary Library
Macquarie Street
SYDNEY NSW 2000

Telephone: (02) 230 2007
(Int. Prefix 61-2)
Facsimile: (02) 231 1932
(Int. Prefix 61-2)

Unsworn Statements of Accused Persons
The Case For And Against Abolition

by
Gareth Griffith

No 002/94

New South Wales Parliamentary Library cataloguing-in-publication data

Griffith, Gareth

Unsworn statements of accused persons : the case for and against abolition / by Gareth Griffith. -- [Sydney, N.S.W.] : New South Wales Parliamentary Library, 1994. -
[iv, 34 p. ; 30 cm.] (Briefing note / New South Wales Parliamentary Library, ISSN 1321-2559 ; 002/94)

ISSN 1321-2559

1. Indictments--New South Wales (LCSH)
2. Evidence (Law)--New South Wales (LCSH)
[1. INDICTABLE-OFFENCES-NEW-SOUTH-WALES (Parliamentary thesaurus)]
[2. EVIDENCE-NEW-SOUTH-WALES (Parliamentary thesaurus)]
3. New South Wales. Parliament. Evidence Bill 1993
I. New South Wales. Parliamentary Library
II. Title
III. (Series) Briefing note (New South Wales. Parliamentary Library) ; 1994/2

347.94406 (DDC20)
347.961-944 (Moys classification)

Published by the New South Wales Parliamentary Library.

CONTENTS

Introduction	1
Background	1
History	3
Amendments to Section 405 of the Crimes Act	6
Unsworn Statements and Sexual Offence Proceedings	7
Incidence and Impact of the Unsworn Statement	8
Unsworn Statements and the Courts	10
Summary of Principal Inquiries	15
Arguments For and Against Unsworn Statements	23

INTRODUCTION

The main purpose of this paper is to set out the arguments for and against the abolition of unsworn statements. These are presented in the concluding section which may be read as a separate entity (page 23).

The earlier sections explain the background to the current debate (page 1), the history of unsworn statements (page 3) and their modification in relation to sexual offence proceedings (page 7). The paper then looks at the use and impact of unsworn statements (page 8) before going on to discuss the way the right operates in the courts (page 10). The recommendations of the principal inquiries are set out next in a separate section (page 15), followed by the account of the arguments for and against the abolition of unsworn statements (page 23).

BACKGROUND

On 27 August 1993 the New South Wales Attorney General released a draft Evidence Bill for public comment. The Bill is said to be the first comprehensive overhaul of the Evidence Act of 1898 and the product of over six years work by the Australian Law Reform Commission and the New South Wales and Commonwealth Attorney General's Departments. The Bill is in fact the product of a joint exercise with the Commonwealth. The Commonwealth Evidence Bill 1993 was introduced into Parliament on 15 December 1993. It is intended that the New South Wales and Commonwealth Bills will be consistent and will, if possible, be dealt with concurrently in the respective Parliaments. Of this joint legislative initiative, the New South Wales Attorney General commented in a press release of 27 August 1993

> This is the most far-reaching reform to the law of evidence that Australia has ever seen, and the fact that it is being achieved in agreement with the Commonwealth government means that it will become a model for evidence laws throughout Australia.

In the same press release it was said that under the proposed Bill, 'Rights of victims will also be enhanced through the abolition of dock statements'. The plan to abolish dock statements was the subject of a separate press release on 16 August 1993 where it was said, among other things, that 'The right to make a dock statement is an anachronistic criminal privilege', providing 'an imbalance in rights

between victims and accused persons'. The press release states that once this legislation is passed the ACT will be the only Australian jurisdiction to retain the dock statement. It seems Norfolk Island can be added to this list.[1] Internationally, it is said, only Fiji, South Africa and Eire appear to have retained the right.

The right at common law to make a statement not on oath and not subject to cross-examination was recognised in New South Wales by section 470 of the *Criminal Law Amendment Act 1883*.[2] This was re-enacted in 1900 by section 405(1) of the Crimes Act which in its current form[3] provides

> Every accused person on his trial, whether defended by counsel or not, may make any statement at the close of the case for the prosecution, and before calling any witness in his defence, without being liable to examination thereupon by counsel for the Crown or by the Court and, after the prosecutor has addressed the jury, or has declined to address the jury, may personally or by his counsel address the jury.

Clause 26(1) of the New South Wales draft Evidence Bill provides

> Any rule of law or procedure or practice permitting a person who is charged with the commission of a criminal offence to make an unsworn statement or to give unsworn evidence in answer to the charge is abolished.

A corresponding provision is not found in the Commonwealth Evidence Bill. This constitutes an important exception to the rule of uniformity which otherwise informs the Bill. As the Commonwealth Minister for Justice commented in his second reading speech, 'The Bills are uniform, except where a difference is required because one is a Commonwealth Bill and the other a State Bill, or for technical reasons'. And except in relation to unsworn statements, one might add, for the Minister for Justice went on to say

---

1 Cth Parl Debs, HR, 15 December 1993, p 4090.

2 New South Wales Law Reform Commission, *Criminal Procedure: Unsworn Statements of Accused Persons Report*, 1985, p 22.

3 It was amended by section 5 of the *Crimes (Amendment) Act 1983* by reversing the order of addresses.

> There is current debate regarding the future of unsworn statements in New South Wales and the Australian Capital Territory and, rather than pre-empt the outcome of that debate, the Evidence Bill 1993 retains the status quo regarding so called "dock statements". Therefore, the provisions regarding unsworn statements of the State or Territory in which the matter is heard will continue to apply.[4]

Thus, clause 25 of the Commonwealth Evidence Bill 1993 provides, 'This Act does not affect any right that a defendant in a criminal proceeding has under a law of a State or a Territory to make an unsworn statement'.

The right of the accused to make an unsworn statement was abolished in both Tasmania[5] and Victoria[6] in 1993. The right was abolished in New Zealand in 1966, in Queensland in 1975, in Western Australia in 1976, in the Northern Territory in 1983, in England in 1983 and in South Australia in 1985.

HISTORY

The right of an accused person to make an unsworn statement arose out of the tangled history of English criminal law. Not until the *Criminal Evidence Act* of 1898 were accused persons made competent witnesses at their trial in England. Before then the accused could not give evidence. Prior to the Revolution of 1688, magistrates examined the accused in court, but this was not upon oath and so did not result in sworn evidence by the accused.[7]

---

[4] Cth Parl Debs, HR, 15 December 1993, p 4090.

[5] *Evidence Amendment (Unsworn Statements) Act 1993* - Royal Assent 2 December 1993.

[6] *Evidence (Unsworn Evidence) Act 1993* - Assented to 11 May 1993.

[7] G Williams, *The proof of guilt - a study of the English criminal trial*, 3rd Edition (London, Stevens and Sons, 1963), p.69. It seems that in the early days of jury trial the same rule was applied to witnesses for the defence, apparently because they would probably be friends of the accused and would be tempted to lie on his behalf. Williams comments, 'It was not thought right to administer a religious oath to those who were likely to be tempted to break it. The same reason that denied the oath to the accused person denied it to his witnesses'. Williams adds that

Plucknett explains that the examination was inadmissible if made on oath, 'for an oath was regarded as involving some degree of compulsion'.[8] It is likely that that argument crystallised around opposition to the Star Chamber, where compulsory examination on oath was common practice. Certainly by the close of the seventeenth-century the case against compulsion and self-incrimination in this context seemed compelling and the practice of questioning the prisoner died out.[9] The principle of disqualification by reason of interest was also applied to criminal cases in the second half of the seventeenth-century, based on Coke's judgment that interested parties would be induced to commit perjury for private advantage. In light of this, WS Holdsworth commented that by that time we find 'judges ruling distinctly that a prisoner's statements were not evidence because he could not be sworn'.[10]

Another feature of the old law was that the accused was not entitled to be represented by counsel, on charges other than misdemeanours, until 1695 in treason cases and 1836 in other felony cases. As the New South Wales Law Reform Commission explained, the harshness of these rules was softened very slightly by permitting all unrepresented accused persons to answer the charge in their own words.[11] This was the origin of the unsworn statement which, in these circumstances, became the prisoner's only effective means of placing his or her case before the court. According to Glanville Williams the first recorded use of an unsworn statement was in 1804.[12]

---

probably the solicitude was rather for the sanctity of the oath itself than for the souls of those who were likely to forswear themselves. Other reasons for the rule are cited, with reference to Sir CK Allen and Wigmore.

[8] TFT Plucknett, *A Concise History of the Common Law*, 5th Ed (London, Butterworths, 1956), p.437.

[9] D Byrne and JD Heydon, *Cross on Evidence, Third Australian Edition* (Sydney, Butterworths, 1986), p.560.

[10] WS Holdsworth, *A History of English Law*, volume IX (London, Methuen, 1926), p.195.

[11] New South Wales Law Reform Commission, *Discussion Paper on Unsworn Statements of Accused Persons*, 1980, p.6.

[12] Williams, *The Proof of Guilt*, op cit, p 45.

Uncertainty arose after 1836, when the right of representation was extended to all trials. Some courts held that an accused person could not be represented by counsel and still retain the right to make an unsworn statement in felony cases. Other judges disagreed. In the event, the right survived, apparently on the basis that it made some inroad into the rule that the accused could not testify.[13] As noted, that situation was rectified in England in 1898, but at the same time the accused's right to make an unsworn statement was retained. Thus section 1(h) of the *Criminal Evidence Act 1898 (UK)* provided that 'Nothing in this Act shall affect...any right of the person charged to make a statement without being sworn'.[14]

The history in New South Wales has been described as 'curious'.[15] Before 1882 the accused could not testify in any court, a state of affairs which was altered in relation to offences punishable on summary conviction before magistrates in 1882. In the following year the right to make an unsworn statement without being liable to cross-examination was granted under section 470 of the *Criminal Law Amendment Act 1883*. This applied whether or not the accused had the benefit of legal representation. Isaacs J explained

> Up to that point of time the legislature were not prepared to break down the common law solicitude for accused persons by which they were protected against compulsory self-incrimination, or to detract further from the principle that the magnitude of his interest made the sworn evidence of a prisoner untrustworthy.[16]

His Honour went on to describe section 470 as a 'compromise', avoiding compulsion but at the same time failing to give the accused

---

[13] Ibid, p 7.

[14] Regarding the historical justification for the nineteenth-century practice of permiting an accused person to make an unsworn statement, Windeyer J said, 'The practice had two advantages. On the one hand it enabled the accused person to put his version of the facts or his explanation before the jury, although he was not allowed to verify it by oath. On the other, it deprived his counsel of a favourite trick of advocacy, of saying when addressing the jury that the prisoner's mouth was closed and to hint that if only he were allowed to speak his innocence would appear': *Bridge v R* (1964) 118 CLR 600, pp 615-6.

[15] *Unsworn Statements of Accused Persons*, 1980, p 7.

[16] *Brown v R* (1913) 17 CLR 570, p 587.

the option of 'strengthening his statement by his oath'. He adds that Parliament 'changed its policy' by section 6 of the *Criminal Law and Evidence Amendment Act 1891*, under which the right to testify was granted to persons charged with indictable offences. The law was consolidated in the *Crimes Act 1900*.

The Crimes and Other Acts (Amendment) Bill 1974 contained a clause proposing the abolition of the right to make an unsworn statement under section 405 of the *Crimes Act*. The clause was defeated by one vote in the Legislative Council on 27 March 1974. RC Packer (Lib), WG Keighley (CP) and JH Gardiner (Ind) crossed the floor and two other Government members, TR Erskine and SL Eskell, abstained.[17] Civil liberties arguments were advanced on behalf of retaining the right. The point was made that accused persons are often young, relatively uneducated and from disadvantaged backgrounds, thus making them especially vulnerable under cross-examination. Further, statistical evidence was advanced to show that the case for abolition allegedly lacked a sound factual basis.[18] The Council's rejection was accepted by the Legislative Assembly on 4 April 1974.

AMENDMENTS TO SECTION 405 OF THE CRIMES ACT

Section 405 of the *Crimes Act*, which provides for the making of unsworn statements, was amended by the *Crimes (Amendment) Act 1983*. Section 405(1) was altered so that the traditional order of addresses was reversed. The Crown now addresses first and the defence replies.

In rare circumstances[19] the prosecution may afterwards obtain leave to make a supplementary address under section 405 (3) of the *Crimes Act*, which was also inserted by the *Crimes (Amendment) Act 1983*. Watson and Purnell[20] explain that the operation of the provision is limited 'to those cases where the defence address has

---

[17] 'Government Loses Crime Vote', *The Sydney Morning Herald*, 29 March 1974.

[18] NSW Parl Debs, LC, 27 March 1974, pp 1983-2021.

[19] *Criminal Procedure: Unsworn Statements of Accused Persons Report*, 1985, op cit, p.22.

[20] Watson and Purnell, *Criminal Law in New South Wales, Volume 1 - Indictable Offences* (Sydney, The Law Book Co Ltd), para. 1149.

asserted facts which are unsupported by evidence: it does not extend to cases where illogical, extravagant or dishonest defence arguments are put'.[21] In the second reading speech the then Attorney-General commented

> ...a defendant in a criminal trial will have the right of final address in all cases, except where in the closing speech by or on behalf of the accused, facts that are relevant to the question of the guilt of the accused are asserted and not supported by any sworn evidence or an unsworn statement that is before the court. Where this happens, the prosecution may with the court's leave make a reply confined to the assertions made by the accused.[22]

UNSWORN STATEMENTS AND SEXUAL OFFENCE PROCEEDINGS

In an attempt to spare complainants in trials for sexual offences from the indignities suffered as a result of false accusations made against their character and reputation, Parliament has acted to place some restrictions on unsworn statements in this context. This was achieved by section 409C of the *Crimes Act*, which was inserted by the *Crimes (Sexual Assault) Amendment Act 1981*. The amendment followed the 1977 report of the Criminal Law Review Division of the Department of the Attorney-General and Justice which stated that 'the use, or abuse, of the dock statement is central to so much of the complaint concerning the existing law and procedures in relation to rape'.[23] The effect of section 409C was explained by the then Attorney-General who said

> Proposed section 409C completes the aim of new section 409B by providing that where the accused makes an unsworn dock statement, he may not make

---

[21] *R v O'Donoghue* (1988) 34 A Crim R 397.

[22] NSW Parl Debs, LC, 30 March 1983, p.5470.

[23] *Unsworn Statements of Accused Persons*, 1980, op cit, p 21. In fact the report recommended that any modification or amendment of the unsworn statement should not be confined to rape trials. The Division recommended that the statement be retained but that the judge be permitted to explain to the jury the nature of the options open to the accused and to instruct the jury that no adverse inference be drawn from the accused's failure to give sworn evidence.

> reference to the complainant's prior sexual history except to the extent that evidence on that subject would have been admissible had the accused given evidence on oath. If the accused transgresses against this rule, the judge shall tell the jury to disregard the prohibited matter. As I said previously, this is an impingement upon the dock statement, but no more than is absolutely necessary. Without such a provision, the prior sexual history aspects of the bill could have been seriously eroded - indeed negated.[24]

In their commentary on the section David Brown et al say that section 409C recognises two realities: (a) that the unsworn statement from the dock is generally an important right of the accused, and is not to be unduly restricted: (b) that in rape trials the unsworn statement from the dock has been grossly abused. They add that, while judges are reluctant to interrupt the flow of an unsworn statement from the dock, 'Nonetheless, where the accused launches into the traditional "character assassination" in his unsworn statement, in terms which are clearly offensive against section 409C, one would expect that the trial judge would immediately and firmly tell the jury (in terms of section 409C (2)) to disregard the offensive matter'.[25]

The Law Reform Commission of Victoria reported in 1985 that 'no defendants charged with sexual assault or drug offences gave sworn evidence, but generally favoured the unsworn statement'.[26]

INCIDENCE AND IMPACT OF THE UNSWORN STATEMENT

This is an important yet difficult area. Its importance was touched upon during the course of the 1974 Parliamentary debate on the proposed abolition of the right to make an unsworn statement. RC Packer commented on that occasion, 'If we are going to move for substantial law reform, we are entitled to know, for example, in how many cases accusations against the police have been made from the

---

[24] NSW Parl Debs, LA, 18 March 1981, p.4766.

[25] D Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (Sydney, The Federation Press, 1990), pp.919-20.

[26] Law Reform Commission of Victoria, *Unsworn Statements in Criminal Trials*, 1985, p 37.

dock and in how many cases other so-called abuses have taken place. We are not given this information'.[27] The difficulty is that official statistical information, be it on the rate of use or abuse of dock statements in New South Wales, is not available.[28]

The Australian Law Reform Commission estimated that unsworn statements are used in 50 to 90% of trials in the New South Wales District Court.[29] On this point, the New South Wales Law Reform Commission said its 'impression is that the true situation would be closer to the lower of these two figures'. It said in addition

- The limited information available indicates that the unsworn statement is used by significant numbers of accused.

- The number of accused who give sworn evidence is rising, probably because juries are sceptical of those who do not exercise this right.

- Information from elsewhere is of limited value because of differences in the rules prohibiting judicial comment and other local variations in practice.

- Critics of the unsworn statement assert that it can be abused to assist the guilty to escape conviction. This argument is inherently incapable of proof or disproof but such studies as have been conducted indicate that the assertion is untenable. Some indications suggest to the contrary. Based on figures showing the total number of appearances and acquittals dealt with by the Supreme Court and District Court in 1982, and bearing in mind that over 90% of all criminal cases were dealt with summarily, usually following a plea of guilty, the Commission concluded that 'the upper limit of the percentage of all accused persons who could possibly obtain an unjustified acquittal by making an unsworn statement is very small'.[30]

---

[27] NSW Parl Debs, LC, 27 March 1974, p.2001.

[28] This statement is based on information received from the Office of the Director of Public Prosecutions, the Judicial Commission and the NSW Bureau of Crime Statistics and Research.

[29] *Evidence*, Volume 1, op cit, p.317.

[30] *Unsworn Statements of Accused Persons*, 1985, op cit, pp. 31-32.

Quite detailed statistical analysis is provided in the 1981 report of the Select Committee of the Legislative Council of South Australia, leading to the conclusion that accused persons making unsworn statements were significantly more likely to be found guilty than those giving sworn evidence. Further, the data indicated that acquittal rates for sexual offences were not significantly different according to whether sworn evidence or an unsworn statement was used by the defence.[31]

On the evidence available, the 1981 report of the Law Reform Commissioner concluded that there was no noticeable change in the conviction rate due to the increased use of unsworn statements after 1977, nor any attributable increase in the number of defended trials.[32] In a similar vein, the 1985 report of the Victorian Law Reform Commission said

> The research carried out by the Commission shows that more than half of the defendants appearing in trials in the superior courts now make unsworn statements. There appears to be very little difference in the conviction rate of defendants who make an unsworn statement and those who give sworn evidence.[33]

UNSWORN STATEMENTS AND THE COURTS

So far as the accused's personal involvement in the presentation of his or her defence is concerned, the accused may choose from a number of available options. One is to remain silent; a second is to make an unsworn statement from the dock, in which case the accused is not liable to be cross-examined; and, thirdly, the accused may give evidence like any witness.[34] In addition the accused may choose to make an unsworn statement and to give sworn evidence.

---

[31] Ibid, p.7.

[32] *Unsworn Statements in Criminal Trials*, 1981, op cit, p 24.

[33] *Unsworn Statements in Criminal Trials*, op cit, 1985, p 19.

[34] D Byrne and JD Heydon, *Cross on Evidence*, Australian Edition, Volume 1 (Sydney, Butterworths, 1991), para 23001. It is said that in addition to these options the accused may call witnesses to testify as to the facts in issue and as to his character.

The unsworn statement should be made before the accused gives or calls evidence.[35] If the accused makes an unsworn statement and then gives sworn evidence, cross-examination may extend to anything he or she may have said in the unsworn statement.[36] Where the accused makes an unsworn statement he or she may not subsequently swear generally in evidence that the statement was true.[37]

The trial judge is not obliged to read section 405 to the jury or summarise it for their benefit.[38] Under section 407 (2) of the *Crimes Act* the judge may not comment on the failure of an accused to give sworn evidence except where comments are made by a co-accused about that fact. In *R v Greciun-King* it was held that this prevented a judge from, in response to a query from a jury member, informing the jury of the courses open to an accused person, even where the judge reminded them that no adverse conclusion should be drawn from the fact that the accused decided to make a statement rather than give evidence.[39] In that case both Street CJ and Lee J expressed their dissatisfaction with section 407 (2), with the New South Wales Law Reform Commission later adding its voice to the chorus of disapproval, describing the current law as 'highly unsatisfactory'.[40]

The point needs to be emphasised that, prior to the abolition of unsworn statements in other jurisdictions, there were marked differences of approach throughout Australia. Notably, the right to make an unsworn statement was available in summary proceedings in Victoria and Tasmania. In New South Wales on the other hand the right is not available in summary proceedings before a magistrate. The New South Wales Law Reform Commission commented, 'The Justices Act, 1902 which does not include reference to such a right has been held to constitute an exclusive code with respect to evidence before magistrates. Since however the right is one

---

[35] *R v Shortus* (1917) 17 SR(NSW) 66.

[36] *Brown v R* (1913) 17 CLR 570. See *Criminal Procedure: Unsworn Statements of Accused Persons Report*, op cit, 1985, p.22.

[37] *R v Tangmahasuk* (1986) 23 A Crim R 460.

[38] *R v Kilby* (No 2) (1969) 91 WN (NSW) 845.

[39] [1981] 2 NSWLR 469.

[40] *Unsworn Statements of Accused Persons*, 1985, op cit, p.51.

conferred at common law, it would seem to be available in other summary proceedings, including contempt proceedings'.[41] The position seems to have been similar in South Australia.

Using Watson and Purnell as a guide, several other points can be made regarding the interpretation and application by the courts in New South Wales of the accused's right to make an unsworn statement

- It was held in *Peacock v The King* that a proper direction to the jury in regard to the statement of the accused is that 'the jury should take the prisoner's statement as prima facie a possible version of the facts and should consider it with the sworn evidence giving it such weight as it appears to be entitled to in comparison with such facts as are clearly established by the sworn evidence'.[42] In its 1985 Interim Report on Evidence the Australian Law Reform Commission commented that sworn evidence has probative value and must be considered 'side by side' with all other evidentiary material in the case.[43] In *Peacock's case* the judge's direction that an unsworn statement inconsistent with sworn testimony 'must be disregarded' was held to be incorrect.

- In *Jackson v The King* it was decided that the jury may properly be told that an unsworn statement is not evidence in the same sense as statements made by witnesses on oath and that it is not subject to cross-examination.[44] In *R v Cormack* a majority of the New South Wales Court of Criminal Appeal held the judge might tell a jury that an unsworn statement 'is not evidence in the same sense as a statement given upon oath. *It has less cogency*'(emphasis added).[45] However, at the same time the court was critical of departures from the form of direction established in *Jackson's case*.

- Watson and Purnell say that only material relevant to any issue

---

[41] *Unsworn Statements of Accused Persons*, 1985, op cit, p.23.

[42] *Peacock v The King* (1911) 13 CLR 619.

[43] *Evidence*, Volume 2, op cit, p 111.

[44] (1918) 25 CLR 113; *Bridge v The Queen* (1964) 118 CLR 600.

[45] *R v Cormack* (1979) 1 A Crim R 471.

being tried in the case may be included in the statement.[46] The Australian Law Reform Commission was more cautious, noting that the law is unclear on whether and in what circumstances irrelevant and otherwise inadmissible material may be included in an unsworn statement.[47] It has been said that in practice the accused is often permitted to canvass inadmissible matters as an 'indulgence' and not as a right, at least if there is no co-accused who might be thus prejudiced.[48] Gillies adds, 'A practical reason for permitting this is that it is difficult to foresee when if at all the accused is going to raise inadmissible matters. Also, it has been said that the accused may raise inadmissible matters where these are bound up with the recounting of admissible ones'.[49] In a similar vein, Byrne and Heydon say that 'both for practical reasons and from a sense of fairness the trial judge will normally give the accused a great deal of latitude as to the contents of his statement. This is particularly the case where there is one accused only'.[50]

- An accused is not limited by the rules of evidence in making his or her statement.[51] There is authority in New South Wales, however, suggesting that hearsay evidence may not be included in an unsworn statement.[52]

- The only statement an accused may make is an oral one,[53] but it seems he or she may read a statement to the jury,[54]

---

[46] *R v Kilby* (No 1) (1969) 91 WN (NSW) 845.

[47] *Evidence*, Volume 2, op cit, p.112.

[48] *R v Attard* (1969) 91 WN (NSW) 824.

[49] P Gillies, *Law of Evidence in Australia*, Second Edition (Sydney, Legal Books, 1991), p.243.

[50] *Cross on Evidence, Third Australian Edition*, op cit, p.569.

[51] *R v McMahon* (1891) 17 VLR 335.

[52] *R v Kilby* (No 1) (1969) 91 WN (NSW) 845; *Evidence*, Volume 2, op cit, p.112.

[53] *R v Morrison* (1889) 6 WN (NSW) 32.

[54] *R v Sheehan* [1926] SASR 243.

although the accused may not have a prepared statement read on his or her behalf.[55] Again, the Australian Law Reform Commission was less certain on this point stating that, in New South Wales, the law is unclear as to whether the statement must be oral or not and whether the statement, if in writing, may be read.[56] Byrne and Heydon comment that 'The judges have persistently emphasised that the statement is that of the accused and not that of his legal advisers. It is perhaps a sensitivity to this criticism which has led to the New South Wales Bar Association ...to lay down strict ethical rules as to what part counsel may properly play in the preparation of the statement. In New South Wales, counsel is permitted to draft the statement but he must obtain from the client an acknowledgment that he understands and agrees with the contents'.[57]

- A document referred to by the accused in an unsworn statement cannot be put in evidence unless it is otherwise admissible.[58] However, *R v See Lun* decided that a material object may be placed in evidence by means of an unsworn statement without complying with the normal rules of admissibility.[59]

- An unsworn statement from the dock cannot be used as evidence against a co-accused.[60] Alternatively, based on the New South Wales case of *R v Kelly*, an unsworn statement is not available to assist a co-accused.[61] Gillies notes that the authority in favour of this proposition is scanty or ambiguous, and cites an alternative approach in a South Australian decision of 1980. His argument is that it is not easy to collect general

---

[55] *Stuart v The Queen* (1959) 101 CLR 1.

[56] *Evidence*, Volume 2, op cit, p.110.

[57] *Cross on Evidence, Third Australian Edition*, op cit, p.568.

[58] *R v Cormack* (1979) 1 A Crim R 471.

[59] (1932) 32 SR (NSW) 363.

[60] Watson and Purnell, op cit, p.426.

[61] *R v Kelly* (1946) 63 WN (NSW) 202.

principles from the relevant cases.[62] The Australian Law Reform Commission cites a further South Australian case to support the proposition that in an adversary situation, where each of the accused is blaming the other, then each of the accused should be able to attack the unsworn statement of the other, in addition to using it to support his or her own case.[63]

- The accused may not be questioned on his or her statement, or, according to Byrne and Heydon, be led through it 'as in examination in chief'.[64] However, it is permitted for counsel to remind the accused of any omission in the statement. This may be at the suggestion of the judge, or the judge may himself prompt the accused.[65]

- According to Watson and Purnell, where unsworn statements of co-accused differ from their accounts given to the police, the prosecutor is permitted to comment on this suggesting the statements had been 'tailored' by agreement.[66]

SUMMARY OF PRINCIPAL INQUIRIES

The right to make an unsworn statement has been the subject of several inquiries both in Australia and overseas. The options canvassed in these inquiries are (i) abolition, (ii) retention, and (iii) retention with reform. There follows a brief summary in chronological order of the recommendations found in the principal reports.

(i) Criminal Law Revision Committee, 1972 (GB): The Committee reported unanimously and in the strongest terms in favour of abolishing the right of the accused to make an unsworn statement, stating that the advantages to the accused which flow from the right

---

[62] Gillies, *Law of Evidence in Australia*, op cit, pp.244-45; reference is made to *R v Mandica* (1980) 24 SASR 394.

[63] *Evidence*, Volume 2, op cit, p.113; reference is made to *R v Harbach* [1973] 6 SASR 427.

[64] *Cross on Evidence, Third Australian Edition* , op cit, p.568.

[65] *R v Ditton* (1927) 44 WN (NSW) 87.

[66] *R v Barnett* [1983] VR 319; generally for this section see Watson and Purnell, op cit, pp.426-27.

are 'not in the interests of justice'. It was said that the legal status of an unsworn statement is that of a kind of inferior evidence - 'inferior in the sense that its value cannot be tested by cross-examination', with the further point being made that there was a tendency for it to be used where the accused has a criminal record and 'wishes to make imputations against the character of the witnesses for the prosecution'. For these and other reasons the Committee concluded that the law as it then stood was 'much too favourable to the defence', adding 'We are convinced that, when a prima facie case has been made against the accused, it should be regarded as incumbent on him to give evidence in all ordinary cases'.[67]

(ii) The Criminal Law Committee (the Amsberg Committee) 1973 (NSW): The Committee reported it was unable to make any firm recommendation as to the abolition or retention of unsworn statements, stating 'After lengthy discussion we find ourselves hopelessly divided on the question'. The Committee agreed that if the right were abolished then

- No one but the Judge should be allowed to comment on any decision by the accused not to give evidence.
- Any comment by the Judge should be restricted to informing the jury that the accused could have given evidence if he chose to do so.
- If no evidence is given or called by the accused, he should have the right of last address.
- If the accused gives evidence he should not be liable to cross-examination as to his character unless he has attacked the character of a Crown witness or raised his own good character.[68]

(iii) The Royal Commission on Criminal Procedure, 1981 (GB): All but one of the Commission members recommended abolition of the unsworn statement, saying they agreed with the Criminal Law Revision Committee's view that the right was 'a useless anachronism'. In its terse, one paragraph comment on the issue the Commission went on to set out the positive objections to unsworn

---

[67] Criminal Law Revision Committee, *Eleventh Report, Evidence (General)*, Cmnd. 4991, HMSO, London, 1972, pp.65-8.

[68] New South Wales, *Report of the Criminal Law Committee*, 1973.

statements. It was noted that its legal status is unclear, giving rise to a situation where the jury can scarcely ignore the statement 'and have to be instructed merely to make of it what they wish'. Also, the Commission reported, 'It is anomalous that this part of the defence case should not be subject to the law of perjury, and we are aware of a number of cases in which the freedom has been abused'.[69]

(iv) Law Reform Commissioner (the Minogue Report), 1981 (Vic): Minogue concluded that unsworn statements should be retained with reform for both indictable trials and in relation to trials for offences in Courts of Summary Jurisdiction. The following comment was made on the preparation of the Police Record of Interview and beyond

> the uneducated and the slow-witted accused, the accused who is unfamiliar with the English language, the frightened accused may well be manoeuvred into admitting facts which he would wish either not to have admitted or to have explained or denied. When he finds himself eventually on trial he at last has a truly unfettered choice of saying what he wishes to say without harassment. That there are others well able to handle interrogation and to generally look after themselves is unquestionable as is the fact that some guilty accused avail themselves of the right to make an unsworn statement.[70]

The report discussed the use of unsworn statements in rape trials, noting that these were particularly problematic. To alleviate the situation legislative amendment was recommended permitting the trial judge to call evidence that the accused has prior convictions or is of bad character where the unsworn statement is used to make imputations on the character of the prosecutor or the prosecution witnesses.

It was further recommended that when an accused person makes an unsworn statement, then a limited right of comment on the failure to give evidence on oath should be vested in both the prosecution and the presiding judge.

---

[69] Great Britain, Royal Commission on Criminal Procedure, *Report*, Cmnd. 8092, HMSO, London, 1981, p.91.

[70] Law Reform Commissioner Victoria, Report No 11, *Unsworn Statements in Criminal Trials*, Melbourne, 1981, p.29.

Significantly, it was recommended that the right to make an unsworn statement and to give evidence on oath should not be cumulative rights but alternative courses of action available to the accused. The Commissioner commented that for the one right to be in addition to the other was of no practical value. In Victoria at least accused persons simply did not seek to make a statement and give evidence on oath. To which the Commissioner added, 'It is difficult to imagine occasions on which use of such a procedure would be sought'.[71]

(v) Select Committee of the Legislative Council (the Sumner Committee), 1981 (SA): The Sumner Committee also recommended retention with reform. It rejected outright abolition because it 'was convinced that to remove the unsworn statement altogether would mean that the particular needs of some defendants, who may be peculiarly disadvantaged in cross-examination because of cultural or personal factors, irrespective of guilt or innocence, would not be able to be taken into account by the court'. On behalf of this option the report cited the following comments by the former Chief Justice of the Supreme Court of South Australia, Dr JJ Bray

> Logic may be against it, but history and humanity are for it. I think it would be a sorry day when every person in the dock of a South Australia court charged with a major crime had only the stark alternative of saying nothing or getting into the witness box and rendering himself open to cross-examination. If the prosecution could make out a prima facie case and the exculpatory facts were within the knowledge of the accused alone, he would be forced into the box, otherwise the jury would have no inkling of his real defence. Too much, it seems to me, would then turn on his appearance, his composure, his demeanour and his powers of self-expression. The plausible, the suave, the glib, the well-spoken and the intelligent would be unduly favoured as compared with the unprepossessing, the nervous, the uncouth, the halting, the illiterate and the stupid. Most people in the dock of a criminal court fall into one or more of the latter classes: many people in the dock have something to hide, even if innocent of the crime charged, and the consciousness of that may give a misleading appearance of shiftiness. It may be said that this applies to all witnesses. The very knowledge of the consequences at stake is likely to

---

[71] Ibid, p 31. Also, the situation where one right was in addition to the other was said to be an anomaly of history.

> multiply the chances of a bad performance. Nor do I think justice suffers as a consequence of the right to make an unsworn statement. Juries are not fools. They are well aware of the differences between making an unsworn statement and giving evidence on oath, and anyhow the judge will remind them of it. The defendant who chooses to make an unsworn statement incurs a handicap. All I urge is that he should retain the right to incur that handicap if he wants to. I would view with revulsion the prospects of his being unable to put his version of the facts before the jury in any form unless he went into the box.[72]

Among the reforms recommended by the Committee was the proposal that unsworn statements be made subject to the general rules of evidence applying to sworn evidence, except those relating to cross-examination. In addition it was recommended that the prosecution should have the right to rebut any new matters raised in an unsworn statement. Consistent with the report of the Victorian Law Reform Commissioner, it was recommended that the right to make an unsworn statement be an alternative right to giving evidence on oath.[73]

(vi) Australian Law Reform Commission, Interim Report on Evidence, 1985: The Commission also recommended retention with reform in relation to unsworn statements. While accepting that the original reason for unsworn statements has ceased to exist, the Commission contended that valid reasons remain for maintaining the right. These include the principle of minimising the risk of convicting the innocent. Noted, too, in this context was the problem of the accused with prior convictions whose case requires an attack to be made on the character of the prosecution witnesses. The Commission's key recommendations have been summarised as follows[74]

- The right to make an unsworn statement in *all* criminal trials, including summary proceedings, should be retained.

- The unsworn statement should be treated as evidence for the

---

[72] South Australia, Final Report of the Select Committee of the Legislative Council, *Unsworn Statements and Related Matters*, 1981, PP150, pp.4-5.

[73] Ibid, p.22.

[74] *Unsworn Statements of Accused Persons*, 1985, op cit, p.33.

purpose of the application of the rules of evidence.

- The statement may not be used for or against a co-accused.

- The rules regarding perjury and false testimony should also be applicable. This recommendation was rejected by the New South Wales Law Reform Commission (see page 22).

- The making of an unsworn statement should be an alternative to the giving of sworn evidence except in special circumstances where the leave of the court to use both forms of evidence is obtained.

- The accused may read his or her statement or refer to notes and in certain circumstances counsel may be permitted to read the statement to the court. The New South Wales Law Reform Commission rejected this recommendation (see page 23).

- Counsel may assist in the preparation of the statement and may, with the court's leave, prompt or remind the accused of any omissions by questioning the accused as though in examination-in-chief.

- The accused should be advised of the options available to him or her in the presence of the jury. The judge and any co-accused may comment on the accused's failure to give sworn evidence. The comment shall not suggest that the statement is, because it is unsworn or not subject to cross-examination, necessarily less persuasive than sworn evidence.

- The prosecution shall have no right of comment.

(vii) Law Reform Commission of Victoria, Unsworn Statements in Criminal Trials, 1985: The Commission was unanimously of the view that the right of an unrepresented defendant to make an unsworn statement should be retained. However, views differed where a defendant was represented. A majority recommended

- The right of a represented defendant to make an unsworn statement in a criminal trial in any court should be replaced by a right to give unsworn evidence not subject to cross-examination.

- Such unsworn evidence is to be elicited by the putting of questions to the defendant by defence counsel, and the

defendant responding.

- Before such unsworn evidence can be given, defence counsel is to notify the judge of the intention to do so, and the judge is to inform the jury of the choices open to the defendant and of the implications of these.

- Where unsworn evidence has been given the judge is to remind the jury of the defendant's choices and their implications at the end of the trial.

Three Commissioners dissented from the above recommendations. Justice Gobbo and Anthony Smith proposed that a represented defendant should not be permitted to make an unsworn statement or give evidence not subject to cross-examination. Jocelynne Scutt proposed that a represented defendant should be permitted to give sworn evidence not subject to cross-examination.

(viii) New South Wales Law Reform Commission, Criminal Procedure: Unsworn Statements of Accused Persons Report, 1985: The Commission was unanimous in its opinion that an accused person should retain the right to make an unsworn statement, but not without reform. This conclusion, as well as the Commission's recommendations for reform, were informed by the ten principles it considered to be fundamental to criminal procedure. Among these were the principles that in criminal proceedings the prosecution must bear the burden of proving the charge; the accused occupies a special position in the trial proceedings as the only person who is liable to suffer conviction and punishment; and the accused should not be compelled to assist the prosecution in discharging that burden. Furthermore, the Commission stated the principle that 'any alteration to the law and practice of criminal procedure should not be made unless there is a clearly demonstrated need for reform'.[75]

On this basis, the Commission recommended

- Subject to its other proposals, retention of the accused's right to make a statement which does not expose him or her to cross-examination. In support of this principal recommendation the Commission noted it was 'not convinced that those accused persons who make, in an unsworn statement, unfounded or scurrilous attacks on prosecution witnesses or false claims of innocence do in fact thereby obtain unjustified

---

[75] Ibid, pp.18-9.

acquittals'(p.38).

- By a majority that there should continue to be no legal sanction for giving false evidence in an unsworn statement. A number of arguments were put by the majority in support of this proposal and the contrary views of the Australian Law Reform Commission were taken into consideration. For example, it was said that prosecutions for perjury are rarely if ever brought in New South Wales. Yet, introducing the theoretical possibility of prosecution in these circumstances may add an unfortunate and unnecessary complication into criminal proceedings. Also, in all probability, the presence of such a sanction would not deter a person who was determined to lie.

- The status as evidence of material advanced in an unsworn statement or exhibits duly authenticated by such a statement should be confirmed by statute; such material should not be evidence for or against any other accused person unless it is adopted by that person; otherwise, the law as to the evidentiary status of an unsworn statement should be unchanged.

- An accused person who makes an unsworn statement may not also give sworn evidence unless the judge gives leave to do so; and if that sworn evidence is given cross-examination may extend to evidence given in the unsworn statement.

- There should be consistency in the rules which determine the circumstances in which evidence of the character of the accused person is admissible in a criminal trial. Where appropriate, the provisions of section 413A of the *Crimes Act 1900* should apply where the accused has only given evidence by way of an unsworn statement. The section sets out the circumstances in which the accused's shield of protection against cross-examination as to his or her bad character may be lifted. The report adds, 'However, consistent with the fact that cross-examination of such a person is not to be permitted, the party which would be entitled to cross-examine the accused person should with the leave of the Court be entitled to lead evidence on the relevant issue, subject to such conditions as the Court thinks fit'.

- The judge should be entitled to inform the jury that an accused person may give sworn evidence, give evidence by way of an unsworn statement, or give no evidence and to inform the jury

of the legal characteristics of each option. This would overcome the unsatisfactory situation encountered in *R v Greciun-King* (page 11), plus other problems noted by the Commission in respect to the 'formula' for permitted judicial observations formulated in *Jackson v The King* and *Peacock v The King* (page 12). However a majority recommended certain limits on judicial comment: (i) a judge shall not comment upon the failure of an accused person to give evidence; (ii) the judge should not suggest that unsworn evidence is, by reason only that it is unsworn or that it was not subject to cross-examination, necessarily less persuasive than sworn evidence: and (iii) the judge should not comment on the reasons why any of the options available to an accused person was or was not taken unless the issue is raised by the accused person or by a co-accused in the presence of the jury.

- The Crown prosecutor shall not comment on the fact that the accused person failed to give sworn evidence or evidence unless this issue has been raised in the presence of the jury by the accused person or by a co-accused or by their legal representatives and the judge gives leave for the Crown prosecutor to comment.

- The right to make an unsworn statement should be extended to summary proceedings. The Commission noted, among other things, that amendments to the *Crimes Act* have extended the jurisdiction of Local Courts so that they can now hear, with the consent of the accused person, a vast range of very serious criminal offences. The desirability of ensuring consistency between the practices of the courts conducting trials on indictment and those of summary jurisdiction was also stated.

- Rejecting the Australian Law Reform Commission's proposal, counsel for the defence should not be permitted to read the statement where the defendant is unable to do so. In the view of the New South Wales Law Reform Commission this would blur the distinction between the lawyer's role as advocate and that of witnesses who give evidence in the case.

ARGUMENTS FOR AND AGAINST UNSWORN STATEMENTS

Clearly, the subject of unsworn statements has attracted considerable interest and debate over recent years. The foregoing survey shows that the option of 'retention with reform' is the one favoured in one

form or another in the principal Australian inquiries. However, abolition has been recommended in other inquiries, for example, the Tasmanian Law Reform Commission in its 1972 report *Revision of the Criminal Code No 1* and the Criminal Law and Penal Methods Reform Committee of South Australia in its 1975 *Third Report, Court Procedure and Evidence*. At the same time the case for outright abolition has been argued forcefully by organisations representing victims of crime and others. It has also been noted that, notwithstanding the recommendations of the principal inquiries, several States have in recent years legislated to abolish unsworn statement: South Australia in 1985, and Victoria and Tasmania in 1993.

There are many aspects to the debate about unsworn statements. At one level it touches upon key issues in the relationship between the citizen and the state, revealing the perennial tensions operating in the administration of the criminal law. This can be expressed in different ways. One conceptual framework, which serves here as an introduction to the case for and against unsworn statements, was presented by Justice Neasey of the Supreme Court of Tasmania in an article on 'the rights of the accused and the interests of the community', published in the *Australian Law Journal* in 1969. He explained that the interests of the community in the administration of the criminal law requires, on the one hand, some encroachment on the personal freedom of the accused person. On the other hand, any individual might possibly, according to circumstances, find him or herself in the position of being suspected or accused of a crime, and it is in this context that the doctrine of the presumption of innocence achieves its full significance. For Justice Neasey the doctrine meant that 'the basic rights of a possibly innocent person must be interfered with no more than the safety and security of the community require'. Put another way the question is 'to what extent should the State, in the investigation of crime and the prosecution of accused persons, limit the operation of its own powers in favour of the rights of the individual?'.[76]

The main arguments found in the contemporary debate for and against abolishing unsworn statements are set out below. These arguments are presented here without commentary or analysis.

---

[76] FM Neasey, 'The Rights of the Accused and the Interests of the Community', *The Australian Law Journal* (1969) 43, p 482. Justice Neasey in fact favoured the abolition of unsworn statements.

(i) The case for abolishing unsworn statements

- **An anachronistic criminal privilege:** It is most often claimed that the right to make an unsworn statement is an historical anachronism. In an age when legal representation in serious criminal matters was more of a privilege of wealth than a right enjoyed by the accused the dock statement may well have served a useful purpose. In Australia any lingering relevance the practices of that age had for justifying the existence of unsworn statements ended decisively with the High Court's decision in *Dietrich v R* establishing the right of the accused to legal counsel at public expense in cases of serious criminal offences.[77] With that decision the last practical justification for the unsworn statement is lost.

  On a slightly different note, it has been argued that the reason for its inclusion in the legislation in the first place is unclear, thus making it even more anomalous. Cowen and Carter make the point in respect to the English Act of 1898, but at a general level it can apply with equal force to New South Wales. They say that once the accused was given the right to give evidence on oath it might have been thought that the reason for allowing unsworn statements had disappeared. On this basis, unsworn statements are not only anomalous now; they were anomalous at the turn of the century. Cowen and Carter state, albeit in an English context, that little consideration was given to the relevant subsection of the Evidence Bill in the course of Parliamentary debate. Whether an accused person should be permitted to give evidence on oath was considered at some length; whether he or she should be permitted 'to make an unsworn statement in lieu of sworn evidence was not really considered'.[78]

- **The victim's case:** The scales of justice are too heavily weighted in favour of the accused where he or she is able, without having to undergo cross-examination, to attack the character and reputation of a distressed victim. This injustice is perceived and felt most keenly in cases of sexual assault. It is

---

[77] (1992) 109 ALR 385. This case and its implications is discussed in the Briefing Note produced by the NSW Parliamentary Library entitled, 'Legal Aid and the High Court's Decision in *Dietrich v R*'.

[78] Z Cowen and PB Carter, *Essays on the Law of Evidence* (Oxford, Clarendon Press, 1956) p 205.

reported that the Victims of Crime Assistance League (VOCAL) argue that the unsworn statement is 'systematically abused', with the accused using their statement to mount character assassinations against victims and other witnesses.[79] The same point is made by women's groups who complain that the character of the victim is besmirched by the accused in his unsworn statement, yet his character is not called into question. This applies even where the law has been amended, as under section 409C of the *Crimes Act*, for there the judge may only intervene to direct the jury to disregard the matter after the accusation has been made - after the damage has been done. The Law Reform Commission of Victoria reported in 1985 that 'no defendants charged with sexual assault or drug offences gave sworn evidence, but generally favoured the unsworn statement'.[80]

From the victim's perspective the issue is not whether statistical evidence can be marshalled showing the negative impact of unsworn statements on conviction rates. Some may argue that it is not a question of statistics at all, but of the sense of injustice felt by the victim who must endure hostile cross-examination and the hostilities of the unsworn statement, all in addition to the trauma of the crime itself. The defenders of the unsworn statement appeal for more evidence when the evidence that matters exists in abundance.

The New South Wales Attorney-General commented in this vein that, 'Dock statements provide an imbalance in rights between victims and accused persons. Victims are now subject to often traumatic cross-examination whereas the accused making a dock statement is not'.[81]

- **No cross-examination of the accused:** Following this, it is said that the unsworn statement is the only departure 'from a system based on the principle of evidence and examination and cross-examination'. A succinct formulation of this objection to unsworn statements is found in the report of the Criminal Law and Penal Methods Reform Committee of South Australia where it is said: 'There is no method of testing its veracity

---

[79] 'Good Riddance to Bad Law', *The Newcastle Herald*, 19 August 1993.

[80] *Unsworn Statements in Criminal Trials*, 1985, op cit, p 37.

[81] Press Release, 16 August 1993.

except by opposing it to the evidence of witnesses who have been called to give evidence and have been cross-examined. The accused is in danger of conviction and of suffering a penalty and the witnesses are not. Nevertheless it must be a most unedifying spectacle for a jury to see and listen to a young girl, the prosecutrix in a charge of rape, being stringently cross-examined and subsequently to hear the accused merely read a statement giving his version of what happened without being exposed to any questioning at all'.[82]

The Commonwealth Director of Public Prosecutions in his 1986 Annual Report advocated abolishing the unsworn statements on similar grounds, saying that 'As the defendant's story cannot be tested under cross-examination there may be deficiencies in it which cannot be exposed. The defendant does not make his statement until the prosecution case has closed and he can tailor the statement to fit the prosecution evidence. While it is theoretically open to the prosecution to call rebutting evidence, the limitations are such that it is rarely done'. The DPP went on to say: 'It is sometimes overlooked that the public has an interest in seeing that the guilty are convicted as well as in ensuring that the innocent go free. If the jury is to properly perform its task, all evidence before it should be in the same form and subject to the same checks and controls. There is no obligation on the accused to give evidence. If he or she chooses to do so, however, it should as far as possible be given in the same form as other evidence in the proceedings'.

- **A licence to lie:** The argument is then made that 'cross-examination can not only expose a lie but it can also discourage a person from lying'.[83] Stated differently, it is said that many accused persons have no defence and use unsworn statements to make any allegations and assertions to provide them with a defence which is untested in cross-examination.[84] The accused can lie with impunity, therefore, causing retired New South Wales Supreme Court judge Mr David Yeldham to comment: 'The real problem with unsworn statements is that the scales of justice are unevenly balanced.

---

[82] Cited in *Evidence*, Volume 1, op cit, p 323.

[83] *Evidence*, Volume 1, op cit, p 325.

[84] Tasmanian Parl Debs, HA, 20 October 1993, p 6086.

They are unevenly balanced against the victim, against the community, against the Crown and in favour of the accused. I can understand why the police believe it is a licence to lie'.[85]

- **Confusing to jurors:** The case is made that the unsworn statement is confusing to jurors, both in respect of the weight to be accorded to it, and of its status in a trial in which all other witnesses enter the witness-box, give evidence on oath or after affirmation and are cross-examined.[86] In New South Wales there is the added twist of the rule in *R v Greciun-King* (page 11) which holds that if 'jurors wonder why the defendant was not cross-examined like every other witness, the judge is not allowed to explain to them that the defendant had a choice of giving evidence on oath and chose not to'.[87] On this issue Byrne and Heydon comment that the argument that unsworn statements unnecessarily complicate the trial is particularly apposite where there is more than one accused: 'It is not difficult to imagine a juror's perplexity upon being told that the unsworn statement is part of the evidentiary material which he must assess in considering the guilt of the accused but not in considering the guilt of a co-accused. But when the co-accused himself gives evidence, that may be used against the accused who spoke merely from the dock'.[88] Jurors are not stupid; but nor are they trained in the finer oddities of the law.

- **Risk of injustice to a co-accused:** In practical terms the risks of injustice to a co-accused in a joint trial can be considerable when one defendant uses the unsworn statement to describe how the other committed the crime. At law this may not count as evidence against the co-accused, but in practice, even though the judge directs the jury to disregard the contents of the statements, the jury will have heard it and find it difficult to set aside.

---

[85] J Fife-Yeomans, 'Licence to lie in court faces challenge', *The Australian*, 19 June 1993.

[86] *Unsworn Statements in Criminal Trials*, 1985, op cit, p 16.

[87] J Fife-Yeomans, 'Licence to lie in court faces challenge', *The Australian*, 19 June 1993.

[88] *Cross on Evidence, Third Australian Edition*, op cit, p 573.

- **Manipulative use by the defence counsel:** The Victorian Law Reform Commission reported in 1985 that the use of unsworn statements has brought with it extensive and wide-ranging cross-examination by defence counsel of the witnesses for the prosecution. That cross-examination is directed towards the purpose of eliciting material useful in the subsequent preparation of the defendant's unsworn statement.[89]

- **Issues of time and expense:** There is no limit to the length of the unsworn statement which means they can be used to manipulate the trial process and cause unnecessary delays. The Attorney-General says they do so 'at a great cost to the community'.

- **The need for uniformity in criminal procedure:** One reason put forward by the Australian Law Reform Commission for maintaining the right to make an unsworn statement no longer applies. This was that abolition 'involves a departure from the position prevailing in most jurisdictions'. The opposite is now the case. Of all the States, only New South Wales has retained the right, thus presenting a significant departure from the desired rule of uniformity in criminal procedure.

- **Experience in other jurisdictions:** Experience in other jurisdictions where the right has been abolished suggests that no person has suffered as a consequence of abolition. Mr Justice Underwood reported to the Tasmanian Justice Department in 1987 that he had been advised in these terms by the relevant authorities in Queensland, Western Australia, the Northern Territory and by the United Kingdom Home Office.[90]

(ii) The case for retaining unsworn statements

- **The argument of insufficient evidence:** The argument is put that the law should only be changed if there is a clearly demonstrated need for reform. This is true of all areas of the law, but the argument applies with particular force in relation to criminal procedure where changes may have direct and profound implications for the liberty of the individual. In relation to unsworn statements, the law as it stands has its

---

[89] *Unsworn Statements in Criminal Trials*, 1985, op cit, p 16.

[90] Tasmanian Parl Debs, HA, 20 October 1993, p 6088.

anomalies and difficulties, as acknowledged by the various government inquiries on the subject, but these require modification to existing practices not the abolition of the right to make an unsworn statement. In terms of abolition, the case for reform has not been demonstrated. Where official statistics exist in other States they do not support the case for abolition, at least not in any unequivocal sense. For example, the Minogue Report found that in Victoria the upper limit of persons who could be said to have gained an 'unjust acquittal' was 3 to 4% of all persons appearing in court.[91] Alternatively, the Australian Law Reform Commission reported comments from Queensland and Western Australia, two States where unsworn statements have been abolished, suggesting that abolition had not had an appreciable effect on the conviction rate.[92] Reported, too, were the comments of the Aboriginal Legal Services Commission and the Legal Aid Commission of Western Australia suggesting that abolition had clearly disadvantaged some Aboriginal defendants.

Official statistics do not appear to be available for New South Wales, a remarkable omission in itself considering how long the case for and against abolition has been debated here. Consequently, the burden of proof which must rest with those advocating abolition has not been satisfied, leading to the conclusion that the case for abolition rests on dubious grounds. Indeed in those jurisdictions where abolition has occurred recently, it can be argued that it did so in spite of the available (and inadequate) evidence. The interests of the community would be served by abolition if unsworn statements reduced conviction rates by allowing the guilty to go free. This has not been shown to be the case.

- **The issue of historical relevance:** The argument that the right to make an unsworn statement is historically anomalous or anachronistic is hardly compelling, it is said. The Australian Law Reform Commission accepted that the original reason for the right to make an unsworn statement has disappeared, but added that 'it begs the question to argue that it is, therefore, an anachronism. The issue is whether there are other reasons why it is appropriate for the accused to have the right to make

---

[91] Victoria, *Unsworn Statements in Criminal Trials*, 1981, op cit, p 25.

[92] *Evidence*, Volume 1, op cit, p 326.

an unsworn statement if he so chooses'.[93] The general point is that any number of practices and institutions can be said to have lost their original raison d'etre, but they are not on that account alone candidates for abolition. The world of law and government is after all full of examples of old practices and institutions which have endured to gain new relevance and credence in the modern age.

- **The argument of principle:** Abolition of the unsworn statement would, in the words of the Council of the New South Wales Bar Association, strike at the principle, embedded in the criminal law, 'namely that from the moment an accused person falls under suspicion and until the conclusion of his trial he need not answer a single question unless he chooses'. Abolition would have the practical effect in many cases of forcing an accused person into the witness box to give evidence and answer questions in cross-examination.[94]

- **Risk of conviction of the innocent:** It is contended that many accused persons will not do themselves justice under cross-examination by an experienced prosecutor. The point is made in this context that removing the right to make an unsworn statement leaves the accused only with the choice between testifying and staying silent, in relation to which the comments of Dr JJ Bray (page 18) remain as relevant as ever. The argument is put that the unsworn statement may assist the accused who 'whether through ignorance or other shortcomings, is at a vast disadvantage during cross-examination'. As Isaacs J explained in *R v McMillan*, the accused may be a 'nervous or weak type of person who may be easily overborne by a strong cross-examiner into saying things which may put an adverse complexion on his evidence'.[95] An innocent person may give the impression of lying as a result of nervousness or ignorance. Lord Reid commented, 'You must bear in mind that an innocent accused person is often stupid, he is often slow, he is often overawed and generally nervous. The result is that he must have a fair

---

[93] *Evidence*, Volume 1, op cit, p 317.

[94] *Unsworn Statements of Accused Persons*, 1980, op cit, p 45.

[95] (1967) 87 WN (Pt 1) (NSW) 387.

deal'.[96]

In its 1980 Discussion Paper, from which the above quotes are taken, the New South Wales Law Reform Commission dealt in some detail with the argument that there are doubts as to the fairness of cross-examination in court, noting, among other things, that misunderstandings arise due to the use of legal jargon, ambiguous words and expressions put in a question in one sense and used in another sense later, plus other devices such as the quick-fired question and the raised voice. The Commission reminds us in addition that direct yet complex questions are asked of the accused with a view to establishing his or her mental state. Also involved in the criminal law are matters of causation which require delicate judgement and a thorough command of the subtleties of the English language. That consideration must carry particular weight in the context of a multi-cultural society where barriers of language make accused persons from non-English speaking backgrounds especially vulnerable to the uncertain rigours of cross-examination.

The Australian Law Reform Commission and others note the special case of Aborigines. If the abolition of the right to make an unsworn statement strikes a blow at the disadvantaged in our society, then that blow falls with special force on the Aboriginal population. The Commission reported arguments to the effect that, because of particular difficulties faced by Aborigines in our trial system, cross-examination may not necessarily be an effective tool to establish veracity. Comment has been made on the tendency of Aborigines to answer questions in the affirmative under cross-examination,[97] a tendency which is perhaps indicative of a sense of cultural alienation from the procedures of criminal law. The rate of Aboriginal imprisonment in New South Wales is worth noting here. The report of the Royal Commission into Aboriginal Deaths in Custody cites figures for the prison census for 1989 showing that Aboriginal prisoners constituted 8.5% of the total prison population.[98] According to the New South Wales

---

[96] Cited in *Unsworn Statements of Accused Persons*, 1980, op cit, p 24.

[97] NSW Parl Debs, LC, 27 March 1974, p 2005.

[98] Royal Commission into Aboriginal Deaths in Custody, *Regional Report of the Inquiry in New South Wales*, Victoria and Tasmania, 1991, p 106.

Prison Census, by June 1993 the figure had risen to 9.6% as a percentage of all prisoners (including periodic detainees) and to 10.7% for those in full time custody. These figures compare with data from the 1991 ABS census showing that Aboriginal and Torres Strait Islanders were only 1.1% of the total population of New South Wales.

- **The vulnerability of the accused:** It is said that the accused is in an especially vulnerable position in any criminal trial. It is his or her liberty alone which is ultimately at stake. The potential for emotional strain on other witnesses, notably in sexual offence cases, cannot be denied, but this should not lead us to a conclusion where we fallaciously equate the position of the accused with that of other witnesses. This argument can be maintained without in any way detracting from the stress and suffering experienced by the victims of crime. Byrne and Heydon comment,'the accused, even in a modern trial, is physically at a disadvantage. He is seated in a place apart, in the custody of warders. He is referred to in the proceedings as "the prisoner" or "the accused" and even if his name is used, it is very often without the normal courtesy which is afforded to other witnesses. Indeed the whole atmosphere is adverse to him'.[99]

- **The accused's day in court:** The New South Wales Law Reform Commission maintained that the unsworn statement is one, and sometimes the only, means whereby the accused can actually participate in his or her own trial on his or her own terms. The Commission considered the statement to be 'an important value in itself - a recognition of the personal worth of the individual matched against the full majesty of the state'.[100] As Dr JJ Bray put it, 'Logic may be against it, but history and humanity are for it'.

- **The case for retention with reform:** The potential for abuse of the right to make an unsworn statement can be recognised, and again the special circumstances of sexual offence cases can be noted. But Parliament has already acted to set limits on the right in the latter context in the form of section 409C of the *Crimes Act* under which the restrictions on cross-examination of prior sexual behaviour of complainants in sexual

---

[99] *Cross on Evidence, Third Australian Edition*, op cit, p 572.

[100] *Unsworn Statements of Accused Persons*, 1985, op cit, p 37.

assault cases also apply to unsworn statements. That solution to the problem may still have its difficulties but these are best addressed through reform and not by outright abolition. In any event it is wrong to say that the making of unsworn statements is an 'unchecked process'. Further, as David Brown maintains, it is wrong to overstate both the rate of use and therefore possible abuse of unsworn statements in a criminal justice system with its 'overwhelming preponderance of guilty pleas' and where trial by jury is reserved for the most serious cases. Brown reports that in 1991 only 1.4% of people charged with criminal offences in New South Wales were tried by jury '(and thus had the option of making a dock statement)'.[101]

The various proposals for reform were set out in an earlier section of this paper (pages 15-23). These include the proposal that the right to make an unsworn statement should be an alternative right to giving sworn evidence. David Brown adds to these the idea of giving victims a similar space or right from which they may speak. The concerns of victims must be recognised but not at the expense of embracing false 'solutions' which act to deny certain basic rights.[102]

The feminist lawyer, Jocelynne Scutt, when rejecting the case for the abolition of unsworn statements, offers an interesting perspective on the relationship of the victim and accused. She looks at women as part of a wider category of disadvantaged persons and concludes, 'The warning for those having genuine concerns about persons from disadvantaged groups is to recognise that members of those groups are not only potential victims of crime but may be accused of crimes. Not to acknowledge this will certainly place at risk some members of the group or groups to which they belong, or for which they hold a brief'.[103]

- **Legitimate reasons for not submitting to cross-examination:** It is acknowledged that the accused may have reasons other than guilt for not wishing to give evidence on oath. For

---

[101] D Brown, 'Silencing in Court', *Civil Liberty*, No 153, September 1993, p 6.

[102] David Brown, 'No Time To Tie On The Gag', *Sydney Morning Herald*, 2 September 1993.

[103] *Unsworn Statements in Criminal Trials*, 1985, op cit, p 33.

example, there may be matters unrelated to the alleged offence which the accused would prefer not to be forced to disclose. The Australian Law Reform Commission refers, among other things, to the accused who does not wish to have to admit facts which could destroy reputations or valued personal relationships.[104]

[104] *Evidence*, Volume 1, op cit, p 322.