reform

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evidence evident

> Most men make little other use of their speech than to give evidence against their own understanding.
>
> Lord Halifax, *Of Folly and Fools*, c. 1680

discussion paper issued. Possibly the largest task yet given to the Australian Law Reform Commission came into the news during the last quarter. The release of a discussion paper, *Reform of Evidence Law* (ALRC DP 16), and a companion, more detailed, Issues Paper, shows that the national debate on the purposes, content and future direction of evidence law is hotting up. The ALRC papers examine possible changes in the rules of evidence applied in federal and Territory courts throughout Australia. The basis of the rules by which evidence is received or rejected by the courts is critically examined in the two papers.

Among factors requiring a fresh look at Australia's evidence rules are:

- declining use of jury trial, especially in federal courts and civil trials;
- growing educational standards of modern juries;
- declining reliance on technical evidence rules, especially in civil trials;
- inconvenience to witnesses called for oral proof of reliable documentary or electronic material;
- differing rules of evidence binding on federal courts. Presently they must

usually apply the evidence law of the State or Territory in which they happen to be sitting;

- advance of new technology including computerised evidence and the availability of videotape recordings to pre-record evidence;
- the rigidity, complexity and artificiality of some rules, especially difficult for unrepresented litigants.

The Commissioner in charge of the evidence project (Mr. T.H. Smith, a Melbourne barrister) explained the problem:

> The rules have been developed over several centuries and are very numerous and complicated. Many lawyers and even some judges find them difficult to remember and apply. Laymen are also critical. People come away from courts on occasions wondering why they have been unable to put things in their own way and, occasionally, why they have been stopped from telling the court something they consider important. We must test the assumptions behind the rules of evidence by the most up-to-date knowledge of modern technology and psychological evidence.

The ALRC discussion paper points to the inconvenience and possible unfairness of the rule which requires federal courts to apply differing evidence law in different parts of Australia:

> The growing number of federal courts and the inconvenience of applying eight different systems of evidence law may justify new federal laws which can be a model for a new approach to evidence law. If evidence law differs from State to State, litigants could choose to bring their case in a particular State which would advantage them or disadvantage their opponents. Obviously a party should not be in a position to pick and choose in such matters. Yet in important respects, the law of evidence today does differ from one part of Australia to another.

Amongst the examples of differences cited in the discussion paper are:

- In Victoria, Tasmania and the Northern Territory (but not elsewhere), a doctor or a priest cannot be required in a civil trial to give evidence of matters received in confidence from a patient or parishioner.
- In the Federal Court sitting in South Australia and Tasmania, a spouse would not be permitted to give evidence for the prosecution. Only in Victoria could a spouse be compelled to give evidence in such cases.
- Recent New South Wales legislation limits the power of courts to require the production of government documents and communications. Elsewhere, different rules govern such evidence.
- Differing rules governing the proof of business documents and computer-produced evidence have been adopted in different parts of Australia.
- Different rules govern whether an accused person in a criminal case can make an unsworn statement instead of going into the witness box and being cross-examined.

After listing and illustrating the problems and differences in Australia's evidence law, the Issues Paper poses some hard 'basic' problems:

- Is the trial a 'search for the truth'? What is the nature and purpose of the civil and criminal trial?
- Should evidence rules in civil cases be more relaxed than in criminal cases?
- Should different rules be applied where a case is being tried by a jury?
- Should the trial judge have the power to call witnesses and in what circumstances?

The questions about the bifurcation of the law of evidence are bound to raise hackles both amongst traditionalists and also among those who say, as a matter of principle, that the law of evidence should be single and consistent. In fact the rules of evidence presently distinguish between civil and criminal trials and the many instances are listed in the Issues Paper. For the long term, perhaps the most interesting points raised in the ALRC papers are the extent to which current approaches to courtroom evidence need to be modified by four important features of modern Australia:

- *Ethnic issues:* the extent to which the new composition of Australia requires re-examination of certain evidence rules (e.g. priest confidentiality).
- *Technological change:* the ramifications, particularly of the new information technology, for evidence law.
- *Psychological assumptions:* the extent to which modern knowledge about memory, reliability of evidence of the young and the old, identification etc. should be reflected in a new evidence law.
- *Adversary trial:* the role of the judge: should he be the ultimate assurance that a trial will search for truth or should he be limited to being a neutral umpire of the resolution of issues which the parties have chosen to litigate?

jury trial. The ALRC Issues Paper, *Reform of Evidence Law* (ALRC IP 3), traces the impact of the jury system on the development of the law of evidence. It questions the assumptions we make about the ability of jurors. The law of evidence has sometimes been called 'the child of the jury system'. Some evidence rules are said to result from a distrust of the jury. The last quarter has seen this debate rekindled in Australia. A catalyst was a call by the Chief Commissioner of the Victoria Police, Mr. S.I. Miller, for modification of jury trial. Mr. Miller was concerned at what he termed the excessively high acquittal rates, particularly in jury criminal trials. His call led to an article by Mr. Peter Sallman, 'Victoria's Criminal Courts on Trial', in *Laura* (80-81) published by La Trobe University Legal Studies Students' Association. Analysing the overall acquittal rate in the Victorian County Court, Mr. Sallman asserted that in the past eight years the average has been steady at about 13%. Mr. Sallman points out that some acquittals will be fully deserved: some people charged are not proved guilty or may even be innocent. He concedes that Mr. Miller's concern raises important questions deserving examination. As an afterthought he adds:

> Perhaps the Australian Law Reform Commission reference on evidence presents such an opportunity.

Mr. Miller, exercising a right of reply in the same journal, asserts again that accused persons who elect to stand trial by jury have an acquittal chance of about 50/50. He questions the 'accepted infallibility of the jury system' and points out that it has not been a feature of proceedings before the High Court, federal courts, the appellate courts or the magistrates' courts.

Mr. Miller then took a novel stand. To end the speculation about jury trial, he urged that 'it is about time' we investigated what goes on behind the closed doors of the jury room. This proposal, flying in the teeth of jury secrecy, provoked the commentators and editors to raise their pens. *The Age* (5 November 1980) put it thus:

> Mr. Miller is not alone in arguing that trial by jury has become obsolete and ought to be modified, if not abolished outright. The belief that it is a guarantee of civil liberties remains implanted in legal mythology and public opinion. Its critics contend that society now has more fear from organised crime than State oppression. ... Much of the criticism [of juries] is, however, based on conjecture. ... One problem is that no-one really knows, except those who serve on a jury, how juries arrive at their verdicts. Mr. Miller has expressed the belief that if the secrets of the jury room were revealed, the case for abolition of juries would be proved beyond reasonable doubt. How this revelation is to be achieved is hard to say, given the present insistence on secrecy. Even if under stringent safeguards, researchers were allowed to observe or tape record jury deliberations, it is possible that a jury's awareness of such monitoring would influence its attitudes. Intrusion or eavesdropping may be too drastic a measure.

The Melbourne *Herald* (4 November 1980) leapt into the fray:

> The Chief Police Commissioner thinks that what goes on in jury rooms should be made public. He thinks that there are too many acquittals, because inside the jury room factors outside the strict rules of evidence tend to apply. But [State Attorney-General] Storey is surely correct to take a broader view. While the jury system as a whole may need to be looked at afresh, he thinks the secrecy of the jury room should not be 'the starting point'. Certainly there would have to be overwhelming reasons for change. No such reasons are in sight.

Among reforms being contemplated, short of the fundamental surgery urged by Mr. Miller, are:

- Provisions for majority verdicts, presently permissible in England, Western Australia, South Australia and Tasmania. It is notable that this provision has not significantly increased conviction rates.
- Greater provision for an accused to opt for judge-only trial.
- Substitution of lay assessors, particularly in conflicts and lengthy trials involving commercial or technological questions.

On this last point, Mr. Justice Beach of the Supreme Court of Victoria, 'trod boldly', according to the Melbourne *Herald* (24 September 1980), when he raised the question of the wisdom of trying complex fraud cases by jury. He was discussing a case which had occupied 91 sitting days of the court and in which more than 100 witnesses had testified. The transcript ran to 8,000 pages. Mr. Justice Beach said he was appalled at the cost to the community of such a trial, leading the *Herald* editorialist to comment:

> Jury service is an onerous and sometimes irksome duty, and to impose this strain on the personal and business lives of 12 members of the community for such a period cannot be justified. Few lay people can claim to understand fully the complexities of most fraud cases anyway. Mr. Justice Beach suggested that had the trial been before a judge sitting alone, or assisted by one or more assessors with accounting experience, the time spent would have been at least halved. Quite so.

mediation and backyard justice. Speaking about the adversary system, which is at the heart of the current rules of evidence and Australia's court procedure, Federal Attorney-General Peter Durack Q.C. told the Convention of the Council of Loss Adjusters in Australia in Perth (13 October 1980) that there was a need for more conciliation and settlement procedures in court:

> Litigation should be seen as the last resort. The adversary system of law suits is not to be seen as an end in itself. The increasing resolution of disputes short of the court would also provide significant side benefits. It is likely to make litigation more efficient when it must be used. Reduction in delays in hearing cases is one obvious way in which greater efficiency could be achieved.

The Attorney-General referred to overseas and international moves towards 'inquiry, mediation and conciliation'. He said that in the area of the Family Court, backlog difficulties had been reduced by:

- Deputy Registrars conducting pre-trial hearings to identify issues for judicial determination; and
- Counsellors helping parties to amicable resolution of custody and access problems.

Senator Durack also pointed to successes in preliminary conferences before the Administrative Appeals Tribunals and other federal bodies. But in the State sphere as well, things are happening. In New South Wales, the Premier, Mr. N.K. Wran, Q.C., has opened 'revolutionary' Community Justice Centres (2 in Sydney and 1 in the provincial city of Wollongong). The Centres are to be manned by a team of mediators who have done an intensive training course in law and human relationships. Many of them come from diverse ethnic and job backgrounds. Legislation to permit the Centres to conduct hearings with confidentiality is to be introduced into the NSW Parliament shortly. The aim is to supplement the conventional courts in handling disputes between neighbours or relatives over sensitive issues such as animals, fences, noise or children's behaviour. As *The Sydney Morning Herald* (9 December 1980) points out, the project is a 'pilot' one. The aim is to resolve 'underlying tensions' often missed by the adversary trial with its ancient procedures and strict rules of evidence:

> Courts tend to look at the specific incident under complaint and try to discover the facts and the law about it. Did someone punch someone else on the nose? Was this an assault? The incident is settled for the time being, but the tensions which created it are not resolved. ... Mediation, seriously yet informally conducted, offers the possibility of resolving those important trivialities that can sour neighbourhood relationships.