

THE NEW SOUTH WALES BAR ASSOCIATION SUBMISSION ON PROPOSED
CHANGES TO THE *EVIDENCE ACT*

The New South Wales Bar Association wishes to comment on the amendments to the *Evidence Act* proposed in the joint report of the Commonwealth, New South Wales, and Victorian Law Reform Commissions (ALRC 102).

This paper will consist of quotations in bold type taken from the list of recommendations in the ALRC report, which are opposed by the Bar Association, together with reasons why the recommendations are opposed.

4. Competence and Compellability

4–1 Section 13(2), (3) and (4) of the uniform Evidence Acts should be amended or replaced to bring about the following:

- **a person not competent to give sworn evidence is competent to give unsworn evidence but may not do so unless the court informs the person of the importance of telling the truth;**
- **all witnesses must also satisfy a test of general competence in s 13(4);**
- **the test of general competence to give both sworn and unsworn evidence in s 13(4) should provide that if for any reason, including physical disability, a person lacks the capacity to understand, or give an answer that can be understood to, a question about a fact and that incapacity cannot be overcome, the person is not competent to give evidence about that fact;**
- **the inclusion of a note to s 13(1) that ‘the person may be competent to give unsworn evidence’;**
- **the inclusion of a note to s 13(4) that ‘the person may be competent to give evidence about other facts’; and**
- **the inclusion of a note to s 13(4) cross-referencing to s 31.**

The Bar Association opposes these proposed changes to s. 13 of the *Evidence Act*. Currently, s. 13 requires as a minimum standard for giving sworn evidence that the person understands that he or she is under an obligation to give truthful evidence. The minimum requirement for a witness to give unsworn evidence is that the person understands the difference between the truth and a lie, and indicates that he or she will not tell lies.

The common law requirements for competence were considerably more stringent. The Bar Association believes that further weakening of the relevant test is undesirable.

5. Examination and Cross-Examination of Witnesses

5-1 Section 29 of the uniform Evidence Acts should be amended to remove the requirement that a party must apply to the court for a direction that the witness may give evidence in narrative form. It should provide that a court may, on its own motion or on application, direct that the witness give evidence wholly or partly in narrative form, and the way in which narrative evidence may be given.

The Bar Association opposes the proposal to remove the requirement that leave be sought before a witness can give evidence in narrative form. There is an increased risk that a witness gives irrelevant or prejudicial evidence if the evidence is not adduced in the traditional question and answer form. There also may be valid reasons known to the parties but not to the judge why such a course should not be taken

7. The Hearsay Rule and Section 60

7-2 The uniform Evidence Acts should be amended to confirm that s 60 operates to permit evidence admitted for a non-hearsay purpose to be used to prove the truth of the facts asserted in the representation, whether or not the evidence is first-hand or more remote hearsay.

The Bar Association believes that s. 60 should remain restricted to first hand hearsay. The proposed amendment would reverse the effect of the High Court in *Lee v The Queen* (1998) 195 CLR 594.

The policy consideration behind the hearsay rule has always been that the further the evidence gets from the direct testimony of an eye witness, the greater the likelihood of it being unreliable, and the more difficult it is to test the by cross-examination. The *Evidence Act* represented a major increase in the exceptions to the hearsay rule. One of the few limitations on the extent of the exceptions was that the evidence generally be first hand. This limitation was made clear both in s. 62 of the Act and the heading to Division 2 of Part 3.1: 'First-hand Hearsay'. This limitation was deliberate, based on the common sense notion that the further one proceeds along the chain of 'Chinese whispers', the less likely it is that an account will be reliable.

The limitation of s. 60 to first hand hearsay should not be removed

8. The Hearsay Rule — First-hand and More Remote Hearsay Exceptions

8-2 The uniform Evidence Acts should be amended to provide that a person is taken not to be available to give evidence about a fact if the person is mentally or physically unable to give evidence about the fact and that inability cannot reasonably be overcome.

The Bar Association opposes this provision, which would result, in many cases, key witnesses being given immunity from cross-examination.

The example discussed in the Report is the sexual assault trial (Report p. 232). In most such cases, a complainant would have no difficulty in obtaining a certificate from a medical practitioner to the effect that the person is mentally or physically unable to give evidence. The jury would under this proposal in such cases simply be presented with the complainant's statement or record of interview, without the accused being able to challenge the complainant's account by cross-examination.

The Commissions note that under the existing s. 65(3) of the *Evidence Act*, transcripts of an unavailable witness's evidence can be tendered if the accused has on another occasion either cross-examined the witness or had an opportunity to cross-examine him or her. This is a very different situation from that which the Commissions now propose. At least under s. 65(3) there is a pre-condition that the accused has had the opportunity to cross-examine the witness. No such precondition exists if the statement is tendered under the proposed amendment to the definition of 'unavailable'.

8-5 Section 72 of the uniform Evidence Acts dealing with contemporaneous statements about a person's health, feelings, sensations, intention, knowledge or state of mind should be repealed and re-enacted in identical form in Division 2 of Part 3.2 of the Acts.

The proposed limitation of s. 72 to first hand hearsay might cause real problems with the admissibility of psychiatric evidence in cases where the accused does not give evidence. For example, in a case where the accused has given a family history to a psychiatrist, based on what the accused had been told, and the accused does not give evidence, the history might not be admissible if the accused does not give evidence.

9. The Opinion Rule and its Exceptions

9-1 Section 79 of the uniform Evidence Acts should be amended to provide that, to avoid doubt, the provision applies to evidence of a person who has specialised knowledge of child development and behaviour (including specialised knowledge of the effect of sexual abuse on children and of their behaviour during and following the abuse), being evidence in relation to either or both of the following:

- (a) the development and behaviour of children generally;**
- (b) the development and behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.**

The Bar Association regards it as undesirable that of the thousands of fields of human knowledge, the only one to be singled out for a specific legislative acknowledgment as an admissible field of expert evidence is the field of expert opinion evidence on the behaviour of children.

If an area of expert evidence is crying out to be singled out to avoid doubt that it is admissible, it is not the development and behaviour of children. It is the field of expert evidence about the dangers of mistaken identification.

There are many difficulties with this sort of evidence. Doctors and counsellors who have treated alleged victims of sexual assault naturally regard it as part of their role to support the alleged victim. Many of them have a deeply felt but mistaken conviction that alleged victims of sexual assault never lie. There is a tendency of such witnesses to treat every conceivable response of the complainant as being a 'normal' response of a victim of sexual assault. Thus immediate complaint is a 'normal' response, but so is not making a complaint for 20 years.

The Issues Paper proposed that experts would be permitted to give evidence that there may be reasons why a complainant delayed making a complaint, or gave inconsistent accounts (pp. 103-4). This comes very close to permitting an expert witness to express an opinion that the complainant is telling the truth. Experience in overseas jurisdictions suggests that when expert evidence of this kind is permitted, trials degenerate into wars between experts over matters very much the province of the jury. The Bar Association believes that these questions are very much matters, which a jury can and should be able to consider, untainted by an expert's opinions.

The Bar Association is opposed to this proposal.

11. Tendency and Coincidence Evidence

12-7 The uniform Evidence Acts should be amended to include a new exception to the credibility rule which provides that, if a person has specialised knowledge based on the person's training, study or experience, the credibility rule does not apply to evidence given by the person, being evidence of an opinion of that person that: (a) is wholly or substantially based on that knowledge; and (b) could substantially affect the assessment of the credibility of a witness; and (c) is adduced with the court's leave. The Acts should also include a provision clarifying that the evidence to which the exception applies includes evidence about child development and behaviour (including the effect of sexual abuse).

The Bar Association agrees with the proposed new s. 108AA, but not with subsection (2). Subsection (2) specifically states that an expert in child development and child behaviour can give evidence, particularly about the development of children who are victims of sexual offences.

As discussed above in relation to the chapter on expert evidence, the Bar Association believes that this proposal would permit experts to very much intrude into the province of the jury. If there is an area crying out for specific nomination as an admissible area of expert evidence, it is not the behaviour of child sexual assault victims, it is problems with identification.

Sub section (2) of the proposed s. 108AA should not be introduced into the Evidence Act.

18. Comments, Warnings and Directions to the Jury

18-3 The ALRC and the VLRC recommend that the uniform Evidence Acts be amended to provide that where a request is made by a party, and the court is satisfied that the party has suffered significant forensic disadvantage as a result of delay, an appropriate warning may be given.

The provision should make it clear that the mere passage of time does not necessarily establish forensic disadvantage and that a judge may refuse to give a warning if there are good reasons for doing so.

No particular form of words need be used in giving the warning. However, in warning the jury, the judge should not suggest that it is ‘dangerous to convict’ because of any demonstrated forensic disadvantage.

The Bar Association believes that it is preferable to leave to the courts the development of the appropriate directions in a sexual assault case where there is a long delay in complaint.