LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

REPORT ON THE

INQUIRY INTO THE

EVIDENCE (AMENDMENT) BILL (NO. 3) 1993

REPORT NO. 6

OF

THE STANDING COMMITTEE ON LEGAL AFFAIRS

August 1994

RESOLUTION OF APPOINTMENT

The following general purpose standing committees be established to inquire into and report on matters referred to it by the Assembly or matters that are considered by the committee to be of concern to the community ...

... a Standing Committee on Legal Affairs to examine matters related to administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, law reform and consumer affairs

ACT Legislative Assembly Minutes of Proceedings, (1992), No. 1, 27 March 1992, p 6.

COMMITTEE MEMBERSHIP

Mr Gary Humphries MLA	Chairman
Mrs Ellnor Grassby MLA	*(from 9 August 1993)*
Mr David Lamont MLA	*(to 9 August 1993)*
Ms Helen Szuty MLA	

Secretary:	Mr Ron Owens *(to February 1993; and from June 1993 to April 1994)*
	Ms Judy Starcevich *(from March to June 1993)*
	Mr Bill Symington *(from April until June 1994)*
	Mr Rod Power *(from June 1994)*
Inquiry Secretary:	Mr Russell Keith

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SUMMARY OF RECOMMENDATIONS

Recommendation 1

4.6. The Committee recommends:

that the right of the accused to make an unsworn statement during criminal trials be generally abolished; and

that the Evidence (Amendment) Bill (No. 3) 1993 be amended to confer a discretion on the court to shield an accused from cross-examination (in whole or in part) where the intellectual disposition or cultural background of the accused makes this appropriate in the interest of justice and in the circumstances of the case.

Recommendation 2

4.9. The Committee recommends that clause 5 of the Bill be amended to provide that the discretion given under the proposed section 70(3) applies to the whole of section 70(2).

1. CONDUCT OF THE INQUIRY

1.1. On 18 June 1993, the Committee resolved to require into and report on the use of unsworn statements in judicial proceedings.[1] On 3 July 1993 the Committee advertised the inquiry in the *Canberra Times* and called for submissions by 6 August 1993.

1.2. The Attorney General introduced the Evidence (Amendment) Bill (No. 3) 1993 (the Bill) into the Assembly on 9 December 1993. On 8 January 1994 the Committee again called for submissions through an advertisement in the *Canberra Times* with the due date for their receipt being 11 February 1994. The Committee had not received any submissions by that date.

1.3. Chief Justice Jeffrey Miles wrote to the Chairman on 3 March 1994 in response to a letter of 22 February seeking comment.

1.4. On 17 March 1994, the Committee held public hearings into the Evidence (Amendment) Bill (No. 3) 1993, the Coroners (Amendment) Bill (No. 2) 1993 and the Criminal Injuries Compensation (Amendment) Bill 1993. The Committee heard from the Attorney General's Department on the issue of the Evidence (Amendment) Bill at that time.

1.5. On 8 July 1994 the Chairman received a letter from the Law Society of the ACT in response to a letter of 14 June 1994 seeking comments on the Bill.

1.6. On 10 August 1994 the Committee met privately with Mr Brian Slarke of the Victims of Crime Assistance League and Mr Richard Refshauge of the Law Society to discuss the Bill. At that meeting Mr Slarke presented a letter to the Committee.

1.7. The Director of Public Prosecutions offered some suggestions and comments regarding the legislation via the Chairman on 18 August 1994.

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[1] *Standing Committee on Legal Affairs Minutes of Proceedings*, (1993), No. 14, 18 June

2. RATIONALE FOR THE BILL

2.1. The Explanatory Memorandum for the Bill states that:

> *The purpose of this Bill is to abolish any rule of common law or statute which allows an accused person in criminal proceedings to make an unsworn statement or to give unsworn evidence.*
>
> *...The Bill* [also] *amends section 70 of the Evidence Act to provide that only gratuitous attacks upon the credibility of the prosecutor or prosecution witnesses are grounds for the loss of the protection provided to the accused by the limitations upon cross-examination contained in subsection 70(1)* [which provides protection from questions related to the defendant's prior convictions or bad character].[2]

2.2. The reason given by the Minister for the introduction of the Bill is that it "removes an obsolete privilege, the existence of which cannot be justified"[3].

2.3. The giving of an unsworn statement by the defendant developed during the Middle Ages when the defendant was not allowed to give sworn evidence and, in felony proceedings, was not entitled to legal counsel. Under present law, where the defendant can give sworn testimony and is entitled to seek legal representation in serious criminal matters, the Government considers the right to give an unsworn statement, which is not subject to cross-examination or the usual application of the rules of evidence, to be an unwarranted privilege.[4]

2.4. That privilege is open to abuse by the defendant by enabling him or her to make unjustified attacks on the character of a victim of criminal behaviour, the prosecutor or a witness without having such attacks questioned or opening him or herself to questions of character. Similarly, the defendant is free to lie or make unsubstantiated statements without fear of charges of perjury or probing cross-examination.

2.5. It is argued that the abolition of unsworn statements will remove those opportunities for abuse and better enable the court to find out the truth of a matter while maintaining the rights of the defendant through the application of the rules of evidence.

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[2] Evidence (Amendment) Bill (No. 3) Explanatory Memorancum, p 2

[3] Mr Connolly MLA, *Hansard*, 9 December 1993, p 4428

[4] op cit p 4427

3. MAJOR ISSUES RAISED IN EVIDENCE

Unsworn statements can increase the suffering of the victim

3.1. Perhaps the strongest argument put for the abolition of unsworn statements was that it gives an unnecessary opportunity for the defendant to attack or otherwise cause distress to the victim of a crime with scurrilous and damaging assertions without any such attacks being called into question or subject to the normal rules of evidence. The Victims of Crime Assistance League noted that:

> *It has been VOCAL's experience that the use of unsworn statements inflicts needless trauma and stress on the victim/witness—especially in cases of sexual assault and child abuse.*[5]

It is essential that the trial process not be infected with elements of the sentencing or reparation process

3.2. The Law Society argued that it is essential that the trial process, whereby the court inquires into whether the defendant is guilty of an offence, be kept completely separate from reparation, compensation or consolation for the victim or retribution to or rehabilitation of the guilty party. Under the current legal system, the purpose of the trial is solely to determine the guilt of the defendant and until the completion of that process the defendant is presumed to be innocent. It is therefore inappropriate for the defendant to be seen to be in any kind of adversarial relationship with the victim where the rights of the victim are juxtaposed with the rights of the defendant. It was argued that there must be no hint of a victim/perpetrator relationship between the victim and defendant in proceedings before the court as that would be to presume the defendant was the perpetrator and be a gross infringement of his or her right to the presumption of innocence.

3.3. Given that reasoning, the Law Society rejected arguments for the abolition of unsworn statements on the basis of an imbalance of rights or unfairness between victim and defendant. Objections to unsworn statements giving the defendant a privileged position in relation to other witnesses are, it was claimed, irrelevant in that the defendant is not like other witnesses. Other witnesses are not on trial, so it is reasonable that their status and rights be different.

People from certain cultures may be disadvantaged by cross-examination

3.4. Some cultures, and most notably in the Australian context, some Aboriginal cultures, require strong deference to authority. The Director of Public Prosecutions suggested that this can result in people from some Aboriginal cultures agreeing with any proposition put to them by a perceived

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[5] Letter from Mr Slarke to the Chairman date 17 August 1994

authority, including the prosecution counsel. In the Australian Law Reform Commission's 1985 report on Evidence, it was reported by the Queensland Aboriginal Legal Service that:

> *many Aboriginal defendants tended to agree with any proposition put to them by persons in authority and often found difficulty with the concept of ascribing 'reasons' for their actions.*[6]

3.5. The Chairman related an experience during the period that he practised as a solicitor where in cross-examining an Aboriginal witness in a NSW court he experienced similar behaviour.

People with diminished eloquence or intellectual capacity may be disadvantaged by cross-examination

3.6. Defendants who lack eloquence or an ability to reason clearly may unjustifiably appear unreliable under cross-examination. Unsworn statements give such defendants an opportunity to express their version of events without the stresses associated with sworn testimony.

3.7. A question was raised about the appropriateness of statements prepared by counsel but given by the defendant as unsworn evidence. The Law Society's representative noted that the important consideration in those circumstances was the defendant's story, not the way it was told.

The risk of convicting the innocent should always be minimised

3.8. Legal tradition has espoused the principle that it is better for a number of guilty people to go free than for one innocent person to be punished. Although in many cases the use of unsworn statements may give an unnecessary advantage to defendants that could conceivably result in the guilty going free, there are occasions, such as those outlined above, where an unsworn statement better enables the defendant to mount an effective defence.

The ACT is the only jurisdiction in Australia and one of the few jurisdictions in the world to still allow the giving of unsworn statements

3.9. Unsworn statements were abolished in Queensland in 1975, Western Australia in 1976, the Northern Territory in 1984, South Australia in 1985, Victoria in 1993 and New South Wales and Tasmania in 1994. It was abolished in the United States and Canada after the introduction of the right to testify in the nineteenth century, in New Zealand in 1966 and in England in 1983.

3.10. The ACT would be unique in Australia and standing against the international trend if it chose not to abolish unsworn statements.

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[6] *Evidence*, Report No. 26 (Interim) of the Law Reform Commission, 1985, p 326

The abolition of unsworn statements elsewhere has not had a notable effect on defendants

3.11. No evidence was found by the Committee that showed that the abolition of unsworn statements in other jurisdictions has had an adverse effect on defendants. There have been no notable changes in the rates of conviction, although concerns have been raised about cases of the types mentioned at 3.4. and 3.6.

Proposed s. 70(3) should apply to the whole of s. 70(2).

3.12. Section 70 provides that if the accused gives evidence, he or she is protected from questions aimed merely to show previous improper conduct or to attack the character or credibility of the accused, except under conditions outlined in s. 70(2). Under s. 70(2), such questions may be asked, **with the permission of the judge**, if any of the following are the case:

> *(a) the person charged has, personally or by his or her counsel or solicitor, asked questions of a witness for the prosecution with a view to establishing his or her own good character;*
>
> *(b) the person charged has given or called evidence of his or her own good character;*
>
> *(c) the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or a witness for the prosecution[, being imputations that are not such as would necessarily arise from a proper presentation of the defence]*[7]*; or*
>
> *(d) the person charged has given evidence against another person tried jointly with him or her for the offence with which the person is charged...*

3.13. The proposed s. 70(3) provides that questions as to the character of the accused may not be asked **by virtue of the operation of paragraph (c)** above "unless the court is of the opinion that the question is relevant to [the accused's] credibility as a witness and that, in the interests of justice and in the circumstances of the case, it is proper to permit the question to be asked".

3.14. The Law Society argued that the discretion to be given in s. 70(3) should apply to all the situations outlined in s. 70(2) and not just s. 70(2)(c). Further, they submitted that the discretion that is currently given to the judge under s. 70(2) is similar to that given in the proposed s. 70(3) but that the limiting of the application of s. 70(3) to s. 70(2)(c) implies that the kind of discretion outlined in s. 70(3) does not apply to s. 70(2)(a), (b) and (d), despite the general discretion given in s. 70(2).

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[7] Text in square brackets is that proposed in the Bill

3.15. The Law Society considers that the court should have the discretion specified in the proposed s. 70(3) in relation to the whole of s. 70(2) and that the Bill should be amended accordingly.

4. FINDINGS OF THE COMMITTEE

4.1. The Committee acknowledges that the original rationale for unsworn statements, that they gave the accused who was considered incompetent to testify on oath an opportunity to put his or her case, no longer exists. The Committee further acknowledges that the right to give an unsworn statement is easily abused by unfairly attacking witnesses and victims. The Committee also notes that the ACT is the only Australian jurisdiction to still allow unsworn statements.

4.2. The Committee affirms the view that the presumption of innocence for the accused is an essential tenet of our legal system and should in no way be diluted or infected. At the same time, while acknowledging that during a trial the rights of the accused are paramount inasmuch as the accused's innocence or guilt is the central issue before the court, the Committee believes that the Australian legal system is evolving to the point where this is no longer the **exclusive** issue in that forum.

4.3. While objections that the rights of the accused are above that of the victim are not a reason to change procedures, complaints that the rights of the victim or witnesses are not sufficiently being protected are. Such complaints clearly can and have been made in relation to the abuse of unsworn statements.

4.4. The Committee is concerned that people from certain cultures and people who are not eloquent or intellectually resilient, as outlined in 3.4. and 3.6., should be able to defend themselves adequately. This concern is in large part alleviated by an accused person's rights to legal representation, to legal aid in serious criminal proceedings and, for those not proficient in English, to an interpreter. However, the Committee believes that these devices may not overcome the disadvantage which will be placed on some defendants should the right to make unsworn statements be abolished.

4.5. The Committee considers that it is difficult to define the circumstances in which such protection as is currently afforded by the unsworn statement should accrue to an accused notwithstanding the general abolition of the right. It believes that the court is best placed to determine the extent to which a defendant deserves some immunity from the full effects of vigorous cross-examination. It believes that it may be appropriate for a discretion to be given to judges to shield defendants from cross-examination where this might otherwise prejudice a defendant's position unfairly.

4.6. The Committee recommends:

that the right of the accused to make an unsworn statement during criminal trials be generally abolished; and

that the Evidence (Amendment) Bill (No. 3) 1993 be amended to confer a discretion on the court to shield an accused from cross-examination (in whole or in part) where the intellectual disposition or cultural background of the accused makes this appropriate in the interest of justice and in the circumstances of the case.

4.7. The Committee supports the intention of clause 5 of the Bill that only gratuitous attacks upon the credibility of the prosecutor or prosecution witness are a ground for the loss of protection provided by s. 70(1) of the Act.

4.8. The Committee shares the concerns of the Law Society outlined under 3.12. above that the discretion given under the proposed s. 70(3) may limit the discretion currently existing under s. 70(2) and considers that the new discretion should be applied to the whole of s. 70(2).

4.9. The Committee recommends that clause 5 of the Bill be amended to provide that the discretion given under the proposed section 70(3) applies to the whole of section 70(2).

Mr Gary Humphries MLA
Chairman
23 August 1994