NSW Law Reform Commission

REPORT 45 (1985) - CRIMINAL PROCEDURE: UNSWORN STATEMENTS OF ACCUSED PERSONS

Table of Contents

Terms of Reference and Participants

NEW SOUTH WALES LAW REFORM COMMISSION
To the Honourable Terry Sheahan, BA, LL, B, MP

Attorney General for New, South Wales

Dear Mr Attorney General,

REPORT ON UNSWORN STATEMENTS OF ACCUSED PERSONS

We make this Report under our reference from your predecessor, the Honourable FJ Walker QC, MP, in relation to Criminal Procedure.

Keith Mason QC

(Chairman)

Paul Byrne

(Commissioner)

Greg James QC

(Commissioner)

Her Honour Judge Jane Mathews

(Commissioner)

Miss Deirdre O'Connor

(Commissioner)

Ronald Sackville

(Commissioner)

The Honourable Mr Justice Adrian Roden

(Commissioner)

October 1985

NEW SOUTH WALES LAW REFORM COMMISSION

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967.

The Commissioners are:

Chairman

Mr Keith Mason QC

Deputy Chairman

Mr Russell Scott

Full-time Commissioners

Mr Paul Byrne

Professor Colin Phegan

Part-time Commissioners

Dr Susan Fleming

Mr Greg James QC

Ms Eva Learner

Her Honour Judge Jane Mathews

Ms Marcia Neave

The Hon Mr Justice P E Nygh

Miss Deirdre O'Connor

The Hon Mr Justice Adrian Roden

Mr Ronald Sackville

Mr H D Sperling QC

This Report has been prepared by a Division of the Commission The members of the Division are listed on page 9.

The Secretary of the Commission is Mr John McMillan. The offices are at 16th Level Goodsell Building, 8-12 Chifley Square, Sydney. NSW. 2000 (telephone (02) 238 7213).

This is the 45th Report of the Commission. Its short citation is LRC 45.

TERMS OF REFERENCE

To inquire into and review the law and practice relating to criminal procedure the conduct of criminal proceedings and matters incidental thereto. and in particular, without affecting the generality of the foregoing, to consider-

(a) the means of instituting criminal proceedings;

(b) the role and conduct of committal proceedings;

(c) pre-trial procedures in criminal proceedings;

(d) trial procedures in matters dealt with summarily or on indictments;

(e) practices and procedures relating to juries in criminal proceedings;

(f) procedures followed in the sentencing of convicted persons;

(g) appeals in criminal proceedings;

(h) the classification of criminal offences;

(i) the desirability and feasibility of codifying the law relating to criminal procedure.

F J Walker QC

Attorney General

17 January 1982

PARTICIPANTS

Commission Members:

For the purposes of the references Division was created by the Chairman in accordance with sl2A of the Law Reform Commission Act 1967, comprising the following members of the Commission.

Mr Paul Byrne (Commissioner in charge of reference)

Mr Greg James QC

Mr Keith Mason QC

Her Honour Judge Jane Mathews

Miss Deirdre O'Connor

The Honourable Mr Justice Adrian Roden

Mr Ronald Sackville

Research

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Ms Lorna Clarke

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REPORT 45 (1985) - CRIMINAL PROCEDURE: UNSWORN STATEMENTS OF ACCUSED PERSONS

Summary of Recommendations

1. Subject to the other proposals in this Report, an accused person on trial before a judge and jury should retain the right to make a statement which does not expose the accused person to cross-examination(4.16)
2. There should continue to be no legal sanction for giving false evidence in the course of an unsworn statement.(4.22)

3. The status as evidence of material advanced by way of 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 other person otherwise, the law as to the evidentiary status of an unsworn statement should be unchanged.(4.35)

4. An accused person who makes an unsworn statement may not also give sworn evidence unless the judge gives leave to do so; and if sworn evidence is given cross-examination may extend to evidence given in the unsworn statements.(4.39)

5. Where the provisions of s4l3A of the Crimes Act, 1900 would apply to an accused person who gives sworn evidence they should be extended to a person who gives evidence only by way of an unsworn statement. 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 leave of the Court be entitled to lead evidence on the relevant issue, subject to such conditions as the Court thinks fit.(4.42)

6. The judge should be entitled to inform the jury that an accused person is entitled to 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.(4.62)

7. A judge shall not comment upon the failure of an accused person to give evidence.(4.68)

8. 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.(4.68)

9. 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.(4.68)

10. 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.(4.74)

11. The right to make an unsworn statement should be extended to summary proceedings.(4.79)

REPORT 45 (1985) - CRIMINAL PROCEDURE: UNSWORN STATEMENTS OF ACCUSED PERSONS

1. Introduction

I. ORIGIN OF THIS REPORT

1.1 As part of its Evidence reference the Commission issued a Discussion Paper *Unsworn Statements of Accused Persons* in 1980 to provoke discussion and comment. A limited number of persons responded, perhaps due in part to the fact that the Commission did not announce any time within which it proposed to report. The Australian Law Reform Commission had been given a reference to review the law of evidence in 1979. Thereafter members and staff of this Commission consulted with the Australian Law Reform Commission with a view to co-ordinating their efforts, but no further work has done by this Commission on this particular topic.

1.2 In 1982 the Attorney General gave a reference to the Commission to inquire into and review the law and practice relating to criminal procedure, the conduct of criminal proceedings ,and matters incidental thereto. The detailed terms of reference are set out on page 7 of this Report. Work on the reference was commenced and a first Issues Paper, *General Introduction and Proceedings in Courts of Petty Sessions* was published in 1982. Thereafter progress on the reference was suspended because of changes in the membership of the Commission. Work was resumed in late 1984. The terms of the Criminal Procedure reference clearly require the Commission to address the question of the right of an accused person to make an unsworn statement.

1.3 The matter became a topical issue in mid 1985 for a number of reasons.

A private members Bill for the abolition of the right to make an unsworn statement was introduced into the Victorian Parliament in early 1985. The debate was adjourned until 1 October 1985. That date was chosen because the Law Reform Commission of Victoria had been previously directed to report on the topic by 30 September 1985.

Although the South Australian government had specifically reaffirmed the right in 1983, with certain reforms, it was announced in July 1985 that legislation was to be introduced in the next session of Parliament to abolish the right subject to a limited discretion in the trial judge, to be exercised in the absence of the jury, to permit an accused person to make a statement if to permit it would result in injustice by reason of diminished intellectual capacity or inability of the accused to express himself.

The Australian Law Reform Commission published its lnterim Report on *Evidence* in August 1985. Whilst covering the whole field of evidence the report contains extensive discussion and recommendations concerning the use of unsworn statements in criminal trials.

These developments took place against a background in which a number of jurisdictions had moved to abolish the right in recent years, most notably Queensland (1975), Western Australia (1976), England (1983) and Northern Territory (1984).

Preliminary discussions which members of the Commission had had with various people who practise regularly in the higher criminal courts had revealed the law and practice relating to unsworn statements to be a matter of some concern.

1.4 For various reasons, which are discussed at paras 1.6-1.8, the Commission decided to report on this issue by 30 September 1985 as part of its Criminal Procedure reference. For that reference the Commission is constituted by a Division whose members are Mr Paul Byrne (commissioner in charge), Mr Greg James QC, Mr Keith Mason QC, Her Honour Judge Jane Mathews, Miss Deirdre O'Connor, The Honourable Mr Justice Adrian Roden and Mr Ronald Sackville. These people bring a wide range of practical and academic experience and significantly for present purposes, have considerable experience in appearing for both the prosecution and the defence in criminal trials. The Commission acknowledges the considerable assistance given by Ms Anna Nemanic who did the background research for the Report.

1.5 In the course of our consultation the question was raised why the Commission was dealing with this topic at this stage. It was suggested that it would be unwise to proceed to report on the issue in isolation divorced from an overall conceptual framework underpinning the entire Criminal Procedure reference. It was also argued that there were other areas of criminal procedure calling for more urgent attention

1.6 In our view it is possible to state various well-accepted general principles and to apply them to the particular issues raised by unsworn statements in criminal trials: we proceed to do so in paras 1.12-1.23. The topic is a relatively discrete one and has been the subject of separate consideration by various law reform agencies. The present rules and practices surrounding the right in New South Wales have been questioned and criticised in recent years. indeed we consider it important that the harsh and justified criticisms made by the Court of Criminal Appeal in R *v Greciun-King*[1] should not go unanswered indefinitely.

1.7 A critical factor in our decision to deal with the matter at this stage is that it is under active consideration by the Law Reform Commission of Victoria and the Australian Law Reform Commission. In an area already beset by widely diverging laws and practices among the States cooperation with other law reform agencies is clearly desirable. Any variations in recommendations should be the product of genuine and enunciated differences of principle rather than a simple reflection of the fortuitous circumstance that different bodies have examined the problem at different times. The Australian Law Reform Commissions Interim Report on *Evidence* contains a very full review of the law and practice and the competing arguments for and against particular reforms in the area and we gratefully acknowledge the assistance we have received from it. At the 1985 meeting of the Standing Committee of Attorneys General (SCAG) concern was expressed about needless duplication in law reform effort in Australia.

We consider the steps taken by us in this matter reflect (though anticipate) such expression of concern.

1.8 The cooperation between these three Commissions on this topic has been significant. Each Commission has shared with the other the benefits of preliminary research and, except where confidentiality has been required, the information and submissions gathered in the Course of the consultative phases of the respective references. Members of the Australian and Victorian Commissions attended the public inquiry referred to in para 1.11 and thereafter participated in discussions with each other about matters that arose out of it. In addition there has been informal collaboration between members of the Victorian and New South Wales Commissions as each progressed towards its final report in order to ensure that no issue or argument was overlooked. We have also been in close contact with Mr Justice Raymond Watson who is conducting an inquiry into federal criminal law and procedure at the request of the Commonwealth Attorney General.

1.9 The goal of uniformity among Australian courts with a criminal law jurisdiction is not one should be sought simply for its own sake. It is a feature which is nevertheless desirable. Uniformity should theoretically lead to increases in efficiency and a possible reduction in the costs of administering the criminal courts. Where there is consistency of approach among the various jurisdictions, the law, legal knowledge and expertise can be taken

across state boundaries. This is of critical importance as the growth of federal criminal law continues. Since the state courts are responsible for hearing charges brought under federal criminal law there is at present because of differences between state laws of criminal procedure, a marked inconsistency in the exercise of federal jurisdiction among the states. That is not a desirable situation and it cannot be seen to be just. If uniformity achieves a greater consistency in the administration of justice within the nation as a whole, then it is something which should be actively pursued.

II. OUR RESEARCH PROGRAM

1.10 A body of written material including academic writings and reports of other law reform agencies was compiled by the Commissions research staff and considered by the Commission. Details of these publications are to be found in Appendix A.

1.11 The Commission decided to hold a public inquiry and to invite interested persons to put submissions in writing or orally. The inquiry was advertised by newspaper and in addition letters were written to judges, practising barristers and solicitors, academic lawyers and relevant interest groups. These letters sought responses to a range of options for reform. The relevant part of the standard form letter is reproduced in Appendix B. The public inquiry which took place on 13 August 1985 was well attended. A number of speakers put their views and more importantly, reasons in support of various alternative options for reform. The Commission also received a large number of written or telephoned submissions. Each of these oral and written submissions has been carefully considered by the members of the Division. A list of the persons and organisations which made submissions is to be found in Appendix C. We are most grateful for the very real assistance that they provided.

III. THE PRINCIPLES UNDERLYING THIS REPORT

1.12 As stated in para 1.6 we have addressed the issues raised in this Report against the background of certain principles which we regard as fundamental and generally accepted.[2] They are at once the foundation upon which our work on this subject is based and the signposts which guide the direction of any movement for change. These principles have played an important role in our assessment of the current law and practice and in the formulation of our recommendations. Naturally the statement of these principles does not lead inexorably to particular conclusions in specific areas. Choices have had to be made as to which principle is to be given priority where two or more conflict in their possible application. Nevertheless these principles are ones which we have sought to obey in this Report. They are certainly not an exhaustive statement of the principles of criminal justice but those which we have used in this part of the reference.

1. The Pursuit of Truth

1.13 One of the objectives of the rules of evidence and procedure at criminal trials should be to ensure that the material presented to the tribunal which is required to determine guilt is truthful and accurate. To this end, the law and practice in the courts should encourage witnesses to give truthful evidence and discourage them from telling lies.

2. The Relevance of Evidence

1.14 The tribunal which is called upon to determine guilt should receive all the evidence presented to it which is relevant to that issue. This basic principle may be departed from (at least in favour of the accused) where there is a valid reason such as unfairness or public policy for excluding evidence which is otherwise relevant. Evidence which is irrelevant to the proof of guilt should where possible be excluded.

3. Minimising the Risk of Convicting the Innocent

1.15 The rules of criminal procedure should minimise the risk that people who are in fact innocent are wrongly convicted. Even if it were regarded as desirable, it is not possible to design a system which will result in all guilty persons being convicted and all innocent persons being acquitted. Human fallibility and the general impossibility of achieving proof to the point of certainty preclude it. In consequence, whatever system is devised, either some guilty people will be acquitted, some innocent people will be convicted or both will occur. We consider the ancient homily that it is better to let several guilty persons go free than to convict one innocent person an undoubtedly proper statement of principle.

4. The Use of Lay juries in Serious Criminal Trials

1.16 It is generally desirable that the trial of serious criminal offences should be conducted before a judge and a representative jury of citizens. If lay persons are to be involved it is necessary for the jury to be given certain information and instructions to enable it to follow the course of the proceedings and to assist it in reaching a conclusion on the question of guilt. (The subject is considered in detail in our Discussion Paper, *The Jury in a Criminal Trial.)*

5. The Onus and Standard of Proof

1.17 In criminal proceedings the prosecution which brings the charge should bear the burden of proving it. Because of the serious consequences which may flow from the proof of guilt, an accused person should be entitled to an acquittal unless his or her guilt has been established beyond reasonable doubt, Unless the statute creating a substantive offence makes it plain this onus is not to be reversed or undermined by rules of procedure or evidence.

6. The Participation of the Accused

1.18 An accused person has the right to participate in the trial of criminal charges brought against him or her. In formulating rules to prescribe the manner of such participation it should be borne in mind that the accused person occupies a special position in the trial proceedings as the only person who is liable to suffer conviction and punishment.

7. The Privilege against Self-Incrimination

1.19 The accused should not be compelled to assist the prosecution in the proof of the offences with which he or she is charged.

8. The Elimination of Misleading Practices

1.20 The rules of criminal evidence and procedure should embody practices which are open and realistic and take account of current standards of knowledge within the community. Procedures that are fictitious or capable of misleading juries should be avoided unless the overriding need to ensure a fair trial compels.

9. Consistency of Criminal Procedure

1.21 The rules and practices governing the conduct of criminal proceedings should be applied uniformly by all courts in this State exercising a criminal jurisdiction. This promotes Consistency of results and familiarity of procedure for the participants in the system

10. The Grounds on which the Law should be Changed

1.22 If likely to affect adversely any of the foregoing, any alteration to the law and practice of criminal procedure should not be made unless there is a clearly demonstrated need for reform. Accordingly, those who propose reforms likely to have this effect carry the burden of showing the need for them and the utility and desirability of the new laws or practices which they propose.

Conclusion

1.23 There is no significance in the order in which we have listed these principles. Indeed we would be surprised if others did not consider that they might be differently expressed or Supplemented. Nevertheless they represent signposts for formulating rules for the processes of criminal law which "must seek to reconcile the need to maintain public order and repress crime, with the need to give fair protection and a fair trial to persons accused".[3]

FOOTNOTES

1.[1981] 2 NSWLR 469. We deal with this case in detail in paras 4.56-4.57.

2. New South Wales Law Reform Commission, First Issues Paper. Criminal Procedure, *General Introduction and Proceedings in Courts of Petty Sessions* (1982) contains a discussion (chapter 5) of some general principles relevant to the entire Criminal Procedure reference.

3. *Oxford Companion to Law* (1980), "criminal procedure". For discussion about an alternative approach see note 2 at paras 5.12-5.15.

2. The Role of the Unsworn Statement in the New South Wales Criminal Law Process

I. THE ACCUSED PERSON'S OPTIONS AND THEIR CONSEQUENCES: THE CURRENT LAW

A. The Unsworn Statement in Contested Criminal Proceedings

1. Trials before a Judge and Jury

2.1 Every accused person on trial before a jury has the right to make an unsworn statement without thereby being liable to cross-examination. Because most of the rules and practices surrounding the making of an unsworn statement are affected by the fact that it forms part of a trial before a jury, it is desirable that the principal features of such a trial should be outlined. In the course of doing so we shall refer to various options open to the accused.

2.2 At the commencement of the proceedings, the indictment is read to the accused who is asked to plead to the offence charged. If a plea of not guilty is entered, the jury will be empanelled.

2.3 In the opening address of counsel for the Crown the main features of the case and the supporting evidence are outlined to the court. The prosecution witnesses are then called and each is required to take an oath or affirmation[1] before giving their evidence. Their evidence then proceeds by way of question and answer between the prosecutor and the witness, When each witness for the prosecution completes his or her evidence-in-chief, counsel for the accused has the right to cross-examine the witness to show up any inconsistencies in the evidence; to elicit facts favourable to the accused; or to call into question the credibility of that witness. The prosecution then has the right to re-examine the witness to re-establish any matters of fact or credit left in doubt by the cross-examination.

2.4 After the close of the Crown case, where the accused intends to give evidence or call any witness or witnesses, the accused or his or her counsel may open the case for the defence by addressing the jury.[2]

2.5 The accused may choose:

- to decline to say anything;
- to make an Unsworn statement;
- to give sworn evidence; or

to make an unsworn statement and to give sworn evidence.

2.6 The right to decline to say anything is a practical consequence of what we discussed in para 1.19. It is complemented by a prohibition on comment regarding the accused's failure to give sworn evidence. The prohibition extends to the judge and counsel for the crown but not to a co-accused or counsel for a co-accused.[3]

2.7 The right at common law[4] to make a statement not on oath and not subject to cross-examination was recognised in New South Wales by s470 of the Criminal Law Amendment Act 1883. This was re-enacted in 1900 by s405(l) of the Crimes Act which in its current form [5] provides that:

> 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.

2.8 The unsworn statement should be made before the accused gives or calls evidence.[6] If the accused gives sworn evidence the procedures of cross-examination and re-examination referred to in para 2.3 apply. Subject only to a limitation of fairness which may require the prosecution to give prior notice of the full case it relies upon before the accused elects to give evidence, the prosecution may cross-examine the accused on matters directly pertaining to guilt the accused, by entering the witness box, waives any privilege against self-incrimination of that nature.[7] However the accused may not be cross-examined on certain matters[8] and the judge s overriding duty to ensure that the trial is fair may mean that the accused receives certain protection which might not be generally available to Crown witnesses.[9]

2.9 Even if the accused elects to make an unsworn statement, he or she is not in law, precluded from later giving sworn evidence. Although the desirable (and usual) practice is that an accused person in a criminal trial should be called to give evidence before other defence witnesses, evidence from the accused at a later stage can not as a matter of law, be excluded.[10] 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.[11]

2.10 The accused may call witnesses for the defence, in which case the above procedure of evidence-in-chief, cross-examination and re-examination is repeated.

2.11 When the defence has called all its witnesses, the evidence in the case is usually complete. The prosecution may, however, adduce evidence in reply to matters required to be proved in the defence case or arising unexpectedly in the defence case.[12]

2.12 The prosecution and the defence then each address the jury in turn. The Crimes Act, 1900 was amended in 1983 to provide that the prosecution addresses first and the defence follows. in rare circumstances the prosecution may obtain leave to address in reply.[13]

2.13 In the course of the judge's summing up to the jury, which then follows, directions of law and a summary of the evidence which has been presented at the trial are given. These directions include matters relating to the assessment of witnesses, and evaluation of evidence and any unsworn statement There are prohibitions upon the type of comment that can be made by the prosecution and the judge in relation to an accused who does not give sworn evidence. These are dealt with more fully below (paras 2.30-.1.33).

2. Summary Proceedings

2.14 The right to make an unsworn statement is not available in summary proceedings before a magistrate. 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.[14] Since however the right is one conferred at common law, it would seem to be available in other summary proceedings, including contempt proceedings.[15]

B. Distinct Consequences of Accused Giving Evidence or Making an Unsworn Statement

2.15 Significant differences result depending on which option the accused chooses. In particular a number of distinct consequences flow depending upon whether the accused gives evidence or simply makes an unsworn statement. It should be stressed, however, that it is dangerous to look at each matter in isolation because the rules on one matter may serve to redress an imbalance caused by the rules in another.

1. Liability to Prosecution for Perjury

2.16 An accused who gives evidence must first take an oath or make an affirmation thereby becoming subject to the rules regarding perjury and false swearing. Perjury is committed where a sworn statement[16] is made in a judicial proceeding which is material to that proceeding and which the person making it knows to be untrue or does not believe to be true.[17] The temporal consequences of committing perjury are liability to penal servitude for seven years.[18] The Crimes Act 1900 also makes it an offence knowingly to make a false statement on oath even when this does not amount to perjury.[19] An accused person giving evidence on his or her own behalf may be charged with these offences[20] but it is very rare for accused persons to be prosecuted.

2.17 The accused who makes an unsworn statement is not exposed to liability for perjury or false swearing. In addition he or she avoids any of the restraints which may bind the conscience of persons who swear or affirm that their evidence will be true.[21]

2. Cross-Examination

2.18 Counsel for the Crown and for any co-accused may cross-examine an accused person who gives sworn evidence. If such accused had also made a prior unsworn statement the cross-examination may extend to anything said in that statement.[22]

2.19 According to s405(l) of the Crimes Act 1900, the accused who makes only an unsworn statement is not liable to examination by counsel for the Crown or by the Court. The fact that cross-examination by a co-accused is not expressly prohibited has been noted elsewhere by this Commission but the issue has not apparently arisen in practice.[23]

3. Evidence as to Character or Disposition

2.20 It is a well established rule of the common law that generally the Crown may not lead evidence of the accused's bad character or prior convictions or cross-examine to raise such matters. There are exceptions, such as the "similar facts" rule or when the accused suggests that he or she is a person of good character. In these instances the Crown or a co-accused may lead evidence of bad character, including previous convictions. Nothing turns upon whether the accused raises good character in an unsworn statement or by other means.[24] Indeed evidence of the accused's bad character can and should be led in the Crown case provided that it has become relevant at that stage.

2.21 Sometimes the bad character of a witness may be raised as a matter relevant to the credibility of that witness rather than directly to an issue. Thus a witness may be cross-examined to show that he or she is a person of bad character or that he or she has a criminal record particularly one related to dishonesty. But because of the general attitude of the law expressed in the first sentence in para 2.20, an accused who gives evidence cannot generally be cross-examined by the Crown about his or her own bad character or previous convictions. This is commonly referred to as a shield given to the accused. There are exceptional cases where this shield will be withdrawn including cases where such cross-examination goes directly to an issue in the case (para 2.20). There is however one exception of particular relevance to the subject matter of this Report.

2.22 The accused person's shield from cross-examination by the Crown as to bad character, where character goes simply to the accused's credit may be lost if the circumstances of s413A(4) of the Crimes Act 1900 apply. That subsection provides:

> Subsection (1) shall not apply if-
>
> (a) the accused person has personally or by his counsel asked any witness for the prosecution or for a person jointly charged with him any question concerning the witness's conduct on any occasion (other than his conduct in the activities or circumstances giving rise to the charge or his conduct during the trial or in the activities, circumstances or proceedings giving rise to the trial or as to whether the witness has committed, or has been charged with or convicted or acquitted of any offence; and
>
> (b) the Court is of the opinion that the main purpose of that question was to raise an issue as to the witness's credibility,

but the Court shall not permit a question falling within subsection(l) to be put to an accused person by virtue of this subsection unless it is of the opinion that the question is relevant to his 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 put.

This provision enables an accused to defend himself or herself by attacking the credit of Crown witnesses or witnesses called by a co-accused in relation to the charge before the court without thereby setting aside the accused's shield of protection but will expose the accused to cross-examination as to his or her own bad character if the attack goes to any matter referred to in s413A(4)(a) and the court, being of the opinion referred to in s413A(4)(b), permits the cross-examination.[25] In this respect the law of New South Wales gives to an accused considerably greater latitude to challenge the credibility of witnesses called by the Crown or a co-accused than other jurisdictions. Indeed one of the major arguments in those jurisdictions (and in New South Wales before the enactment of s413A) for retention of the right to make an unsworn statement was to enable the accused who would, in giving sworn evidence, be exposed to cross-examination as to his or her own bad record by reason of having made such an attack to make it without being exposed to cross-examination The accused person's shield from cross-examination as to bad character on the issue of credit will also be put aside where the accused person has given sworn evidence against any person jointly charged in the same proceedings (s413A(5)).

2.23 As we have indicated in the previous paragraph an accused person who gives sworn evidence will by virtue of s,413A(4) and s413A(5), be exposed to cross-examination as to his or her own bad character in certain circumstances. This creates an anomaly quite unintended by those who drafted the 1974 amendments to the Crimes Act 1900. Those amendments included a provision for the abolition of the right to make an unsworn statement but this aspect of the Bill was rejected by the Legislative Council,[26] and ss413A, 413 B and 413C became law without involving the abolition of the right to make an unsworn statement.[27] Thus it comes about that an accused who gives evidence may, by virtue of s413A(4), be liable to have his or her bad character revealed in circumstances where an accused who makes an unsworn statement is not. We deal with this question of character at para 4.40-4.43.

4. Application of the Rules of Evidence

2.24 Sworn evidence is still subject to the complex rules of evidence. It is adduced by question and answer thereby enabling objections to be taken and ruled upon. The rules regarding relevance and hearsay impose the major restrictions on the admissibility of material sought to be adducted.

2.25 We discussed the evidential Status of the unsworn statement in some detail in the 1980 Discussion Paper. It is clear that all unsworn statement can be used to prove facts in issue and may have probative even if it is inconsistent with other evidence.[28] As we have noted before (para 2.20), if the accused person puts his or her character in issue in an unsworn statement, bad character can be proved.[29]

2.26 The accused probably has no legal right to include irrelevant or hearsay material in the statement, although, by, way of indulgence and because of difficulty in controlling material given direct statement without prior questioning considerable latitude may be given.[30] In New South Wales, but not Victoria, an accused may identify an object or document in the unsworn statement which, if relevant, may be treated as part of the statement and shown to the jury.[31]

2.27 The need to curb irrelevant and inadmissible material may be greater where there is a Joint trial. According to local Authority an unsworn statement by one accused cannot be used to assist another in his or her defence,[32] but there is authority to the contrary in other ,jurisdictions.[33] One accused can however in his or-her own unsworn statement adopt all or part of what is said by a co-accused in the latter's unsworn statement. It is clear that an unadopted statement by one co-accused cannot be used against another co-accused.[34]

5. Role of Counsel

2.28 An accused who gives evidence does so if represented by counsel, in answer to a series of questions. This not only allows the Crown to object to any question, but also allows counsel for the accused to exercise some control over the content of the accused's evidence, if only by avoiding irrelevant or prejudicial material.

2.29 Although the accused who makes an unsworn statement is generally required to deliver it orally and has no right to read it or even refer to notes, some judges in New South Wales will permit this, although the practice is not uniform.[35] However it is the practice to allow the accused, at the end of the statement to be reminded by counsel of any omissions.[36] Such communication takes place in the presence and usually in the hearing of the judge and jury. In addition it is acceptable for counsel to assist the accused in the preparation of the statement, subject to certain ethical limits laid down by the rules of the New South Wales Bar Association.[37]

6. Comment

2.30 Section407(2) of the Crimes Act 1900 provides that the failure of an accused person to give sworn evidence, shall not be made the subject of any comment by the judge or by counsel for the Crown. Should the accused make an unsworn statement the judge may call attention to the fact that it is not on oath and is not subject to cross-examination. A "formula" has been approved by the appellate courts prescribing the way in which a jury is told how it should use material contained in an unsworn statement. We discuss it and its deficiencies below (paras 4.50-4.52). It is set out here to draw attention to the significant contrast drawn between sworn evidence and an unsworn statement in the almost universal judicial summing up on the topic:

> That statement is something which the law requires you to take into consideration together with the evidence, but it is not in itself evidence in the same sense as the statement of a witness given on oath; it is not subject in any way to test by cross-examination. You should take it as prima facie a possible version of the facts and consider it with the sworn evidence, giving it such weight as it appears to be entitled to in comparison with the facts clearly established by evidence.

2.31 The judge, however, must not refer, directly or indirectly, to the fact that the accused had the right to give sworn evidence and chose not to. Thus, while a judge may distinguish the evidence on oath from the evidence not on oath and not subject to cross-examination he or she may not contrast the course taken by the accused with an alternative available to, but not taken by, the accused. This means that it is a misdirection simply to outline the options available to the accused under the Crimes Act 1900. This is so even if it is done in answer to a specific question from the jury.[38]

2.32 This prohibition of a certain type of comment presupposes that none of the members of the jury will know that the accused has the right to give sworn evidence. Further, it is assumed that a reference to the difference between sworn and unsworn evidence in the "formula" direction will not alert the jury to the possibility that the accused has that right.[39] The Australian Law Reform Commission has called such an assumption "unrealistic".[40] We agree.

2.33 An accused person, or his or her counsel is by s407(2) of the Crimes Act 1900 expressly entitled to comment on the failure of a co-accused to give sworn evidence. This right can have a very telling effect upon the case of an accused person who makes an unsworn statement in a Joint trial in which a co-accused has given sworn evidence. The latter or his or her counsel is entitled to contrast the two approaches and to discuss the possible reasons for the co-accused having taken a certain course. Where this occurs the judge has a discretion to make such comment as he or she thinks fit.[4l]

II. HISTORY IN NEW SOUTH WALES

A. Common Law Right

2.34 During the nineteenth century the practice arose of permitting the accused to make an unsworn statement in answer to the prosecution case. This was a response to the fact that the accused could not at that time give evidence on oath-the accused was not a competent witness. It was also a response to the fact that the accused had no right to be represented by counsel except in the case of misdemeanours. Representation was not permitted for charges of felony until 1840.[42]

B. Statutory Recognition in New South Wales

2.35 Section 1 of the Evidence in Summary Convictions Act, 1882 granted the accused the right to testify on oath in offences triable summarily before a magistrate. Section 6 of the Criminal Law and Evidence Amendment Act 1891 extended that right to indictable offences. That right is now enshrined in s407 of the Crimes Act 1900.

2.36 The common law right to make an unsworn statement, which has been described above at para 2.34, was given statutory recognition in s470 of the Criminal Law Amendment Act, 1883. This was later consolidated in s405(l) of the Crimes Act 1900.

C. The Amsberg Committee

2.37 In 1971 a committee under the chairmanship of His Honour Judge Amsberg QC was appointed by the then Attoney General to review various aspects of New South Wales criminal law and procedure. The committee

reported in 1973 but was unable to make a recommendation as to the abolition or retention of the right to make an unsworn statement. The committee was "hopelessly divided"[43] on the issue. However the committee's formulation of the terms of' debate regarding the abolition or retention of the unsworn statement has been influential in subsequent discussions of the matter.

D. The Crimes and Other Acts (Amendment) Act, 1974

2.38 The Crimes and Other Acts (Amendment Bill, 1974 was based on the recommendations of the Amsberg Committee but also included a clause abolishing the right to make and unsworn statement. That clause passed through the Legislation Assembly but was rejected by the Legislative Council. The Bill was enacted in 1974 without that particular clause and significantly without any alteration to any other sections drafted on the understanding that the right to make an unsworn statement would be abolished. This created the anomaly in s431A referred to in para 2.23 above.

E. Sections 409B and 409C of the Crimes Act, 1900

2.39 ln l977, the Criminal Law Review Division of the Department of the Attorney General and Justice reported on the law and procedure relating to the offence of rape. The Division argued that any modification or abolition of the unsworn statement should not be confined to rape trials. This was notwithstanding the finding that the abuse of the unsworn statement was central to much of the dissatisfaction with existing law and procedure in 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 should be drawn from the accused s failure to give sworn evidence.[44]

2.40 In accordance with recommendations in this last mentioned report the Crimes Act, 1900 was amended in 1981 by the introduction of section 409B which severely limits the admissibility of sworn evidence relating to the sexual experience and reputation of the complainant Section 409C extends the same restrictions to material contained in an unsworn statement.

FOOTNOTES

1. Strictly speaking, s13 of the Oaths Act, 1900 speaks of witnesses making a "declaration" but it is common parlance to speak of "affirmation" as the alternative to "oath". In the Report "sworn evidence" will be used to refer to evidence given on oath or affirmation.

2. Crimes Act, 1900 s405(2). It seems that this right is not available if the accused intends only to make an unsworn statement see the distinction between "evidence" and "unsworn statement" in s405(3).

3. Crimes Act, 1900 s407(2).

4. *Fraser v The Queen* [1984] 3 NSWLR 212 at 226.

5. It was amended by s5 of the Crimes (Amendment) Act 1983 by reversing the order of addresses.

In *R v Shortus* (1917) 17 SR(NSW) 66 a new trial was granted where, owing to a bona fide mistake in the conductor the trial by the accused's solicitor, a witness was called for the defence before the accused applied to be allowed to make a statement under s405. The trial judge had declined to allow the accused there after to make an unsworn statement.

7. *R v* Chin (1985) 59 ALJR 495.

8. Crimes Act, 1900-413A, *Maxwell v Director of Public Prosecutions* [1935] A309. See further paras 2.202.23 below.

9. See eg *Lister v R* (1983) 58 ALJR 97; *R v* Chin, note 7 above.

10. *R v Lister* [1981] 1 NSWLR 110.

11. *Brown v R* (1913) 17 CLR 570.

12. Watson and Purnell Criminal *Law in New South Wales,* Vol 1A para 1093. The right is severely limited: see *R v Chin*, note 7 above.

13. Crimes Act 1900 s405(3).

14. *Ex parte Holland* (1912) 12 SR(NSW) 337; *Fraser v The Queen* note 4 above at 225-226.

15. *Fraser v The Queen,* note 4 above, at 224-229. Cf *Lavender v Petherick* [1960] SASR 108.

16. Where the accused makes an affirmation in lieu of an oath a false statement can still constitute perjury. Oaths Act, 1900 s13(1), Crimes Act, 1900 s342.

17. 1 *Hawkin's Pleas of the Crown* 69, cited in Watson and Purnell note 12 above para 96 1.

18. Crimes Act, 1900 s327. Perjury committed with intent to procure conviction or acquittal in certain very serious offences may attract a penalty of up to 14 years penal servitude: Crimes Act. 1900 s328.

19. Crimes Act 1900 s330.

20. *R v Dean* (1896) 17 NSWLR(L) 35; *DPP v* Humphreys [1977] AC 1.

21. Naturally, opinions vary, as to the continued efficiency of the oath as a curb on lying: see New South Wales Law Reform Commission Discussion Paper *Oaths and Affirmations* (1980) chapter 1 and the Australian Law Reform Commission Interim Report on *Evidence* (1985) chapter 28.

22. See note 11 above.

23. New South Wales Law Reform Commission, Discussion paper *Unsworn Statements of Accused Persons* (1980) para 2 3.

24. *R v Stalder* [1981] 2 NSWLR 9.

25. In our Working Paper on Evidence of Disposition (1978) paras 5.6-5.7, expressed the view that s413A(4) ought to be amended to allow the accused to attack the prosecution with impunity. The subsection has not been amended and we shall proceed oil the basis that it will remain.

26. New South Wiles-Hansard (Council) 26 March 1974, p1828, 27 March 1974, pp 1983-2027.

27. New South Wales Law Reform Commission note 23 above, para 30.

28. In, paras 16-22. See also *Sorgenfrie v The Queen* (1981) 51 FLR 147; *R v Cormack* (1979) 1A Crim at 471 at 479; *R v Mandica* (1980) 24 SASR 394. The dicta in *R v Dugan* [1984] 2 NSWLR 554 at 559,561 seem difficult to reconcile with these authorities. This question is also considered in some detail by the Australian Law Reform Commission note 21 above vol 2 pp 111-112 and in *Cross on Evidence* 2nd Aust ed para 8.41.

29. *R v Stalder* [1981] 2 NSWLR 9.

30. New South Wales Law Reform Commission note 23 above paras 18-19, Australian Law Reform Commission, note 21 above vol 2, p112-113.

31. Australian Law Reform Commission note 2 1 above, vol 2, p113. This is discussed in further detail in para 4.33 below.

32. *R v Kelly* (1946) 46 SR(NSW) 344. The same rule applies in relation to an out of court statement by a co-accused.

33. *R v Callaghan* (1971) 64 Cr App R 11; *R v Harbach* (1973) 6 SASR 427.

34. *R v Penberthy* (NSW Court of Criminal Appeal 26 October 1978. See also New South Wales Law Reform Commission note 21 above, pl6 54 and *R v Mandica* (1980) 24 SASR 394.

35. New South Wales Law Reform Commission. note 23 above, paras 11-12.

36. Id, para 1.

37. Rule 55 of the Rules of the New South Wales Bar Association See also para 5.7 below.

38. *R v Greciun-King* [1981] 2 NSWLR 469.

39. *Bridge v The Queen* (1964) 118 CLR 600 at 616, per Windeyer J.

40. Australian law Reform Commission note 21 above. at p143 para 279.

41. Crimes Act 1900 s407(2), proviso.

42. Defence on Trials for Felony Act-1840 (4 Vic No 27).

43. New South Wales Law Reform Commission note 23 above, para 29.

44. Criminal Law Review Division of the Department of Attorney General and Justice, Report *into Rape and Other Sexual Offences* (1977) pp33-35.

3. Some Background and Comparative Material

3.1 Before proceeding to our recommendations (Chapter 4) we note some additional background and comparative material.

I. INCIDENCE AND IMPACT OF THE UNSWORN STATEMENT

A. Incidence of the Unsworn Statement

3.2 The limited information available indicates that the unsworn statement is used by a significant number of accused. The Australian Law Reform Commissions researches led it to an estimate that the statement is used in 50 to 90 per cent of trials in the New South Wales District Court.[1] Our own impression is that the true situation would be closer to the lower of these two figures. We think it proper, however, to observe that the number of accused who give sworn evidence is rising. This is probably due to a belief that juries are aware of the fact that the accused has this option and that they may be sceptical of those who do not exercise it.

3.3 Information from elsewhere is of limited value because of differences in the rules prohibiting judicial comment and other local variations in practice. However some statistics kept in the Melbourne Supreme and County Courts revealed that the proportion of those making unsworn statements was between 35 and 40 per cent of all persons standing trial between 1977 and 1980.[2] In South Australia, the Supreme Court heard an average of 31 percent of accused persons in defended trials make an unsworn statement in 1979 and 1980.[3]

B. Impact of the Unsworn Statement

3.4 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.

3.5 The Minogue Report concluded that there was no noticeable change in the conviction rate due to the increased use of unsworn statements. In fact since the law in Victoria was amended to give the right of last address to an accused whether or not he or she made an unsworn statement there had been a marginal increase in the conviction rate for defendants standing trial. Nor had the use of statements led to an increase in the number of defended trials.[4]

3.6 After examining the relevant statistics for l980, the Sumner Committee in South Australia concluded that accused persons making unsworn statements were significantly more likely to be found guilty than those giving sworn evidence.[5]

3.7 In New South Wales the total number of appearances dealt with by the Supreme Court and District Court in l982 was 4,824. Of these, 4051 or 84% culminated in a plea of guilty. Accused persons were acquitted in 7.4% of appearances. The offences most commonly resulting in acquittal were assault/homicide (16.7% of people charged were acquitted), other offences against the person (9.4%), driving (21.5%) and sexual offences (10.3%).[6] When it is also borne in mind that over 90% of all criminal cases (excluding juvenile, minor traffic and parking offences) were dealt with summarily, usually following a plea of guilty, in what are now called Local Courts,[7] 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.

3.8 Other analyses have involved an estimation of the greatest number of persons who could be said to have escaped conviction because of the unsworn statement. In Victoria the upper limit of persons who could be said to have gained an "unjust acquittal" was found to be 3 to 4 per cent of all persons appearing in court.[8] In South Australia the percentage of accused persons who were acquitted after making an unsworn statement in the Supreme Court was 9 per cent of those standing trial and pleading not guilty in 1979 and 5 per cent in 1980. In the Local and District Courts it was 4 per cent in both 1979 and 1980.[9] These figures are naturally dependent upon the extent of the practice of making an unsworn statement in those jurisdictions.

3.9 Yet another study has examined the conviction rates in two jurisdictions where the unsworn statement has been abolished-Queensland and Western Australia. Whilst the data was highly subjective in neither case could it be said that abolition of the unsworn statement had had an appreciable effect on the conviction rate.[10]

II. THE POSITION ELSEWHERE

3.10 In our 1980 Discussion Paper (paras 82-83) we referred to developments in other jurisdictions. The current position is that the right to make an unsworn statement in a criminal trial was abolished in Queensland in 1975 in Western Australia in 1976 and in Northern Territory in 1984. It was abolished in New Zealand in 1966 and in England in 1983. It disappeared in the United States and Canada after the right to testify was given in the nineteenth century. The right to make an unsworn statement now exists in the Australian Capital Territory, Victoria, Tasmania, South Australia and some overseas jurisdictions including South Africa and Eire. The right also exists in courts martial under the recently promulgated Defence Force Discipline Rules.[11]

3.11 It is particularly interesting to note that in South Australia the issue was extensively reviewed by a Select Committee of the Legislative Council in 1981. Pursuant to that Committee's recommendation the right to make an unsworn statement was confirmed by statute in 1983 but excluded from summary proceedings and otherwise circumscribed.[12] However on 24 July 1985 the South Australia Attorney General Mr Sumner announced that the right to make an unsworn statement would be abolished, although the trial judge would be given a discretion, to be exercised in the absence of the jury, to permit the statement if to refuse it would result in injustice by reason of diminished intellectual capacity of the accused, or because of the inability of the accused to express himself or herself. This change was announced as part of a package of reforms relating to sexual assault.[13]

3.12 The Australian Law Reform Commission has recently made recommendations for reform in this area as part of its Interim Report on *Evidence:*

> 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 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
>
> 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.
>
> 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 accuse(f s failure to give sworn evidence. That comment shall not suggest that an inference of guilt is to be drawn from the accused s decision to make an unsworn statement nor shall it suggest that the statement is**,** by reason only that it is unsworn or not subject to cross-examination necessarily less persuasive than sworn evidence.
>
> The prosecution should have no right of comment.[14]

FOOTNOTES

1. Australian Law Reform Commission, interim Report on *Evidence* (1985) vol 1 at p317 para 584.

2. Law Reform Commissioner, Victoria, Report on *Unsworn Statements in Criminal Trials*(1981) (hereafter referred to as the "Minogue Report") para 5.12.

3. Select Committee of the Legislative Council, *Final Report on Unsworn Statements and Related Matters* (1981) (hereafter referred to as the "Sumner Committee") para 7(d).

4. Minogue Report note 2 above, paras 5.14-5.15.

5. Sumner Committee, note 3 above at para 7(e).

6. Bureau of Crime Statistics and Research, *Court Statistics 1982* p55.

7. Id, pp7, 24, 31 and 55.

8. Minogue Report note 2 above, para 5.16.

9. Sumner Committee, note 3 above, paras 7(i) and (j).

10. Australian Law Reform Commission, note 1 above, para 590.

11. Defence Force Discipline Rules (Statutory Rules 1985 (Commonwealth) No 128) rule 46.

12. Evidence Act Amendment Act 1983 s3 (inserting a new s18a in the Evidence Act, 1929).

13. Report in *The Advertiser* 25 July 1985.

14. Australian Law Reform Commission, note 1 above, vol 1 pp326-332 paras 591-592, vol 2 pp 25-26.

4. Recommendations

I. INTRODUCTION

4.1 It would be wrong to address the issues raised in this Report simply by asking whether unsworn statements by accused persons should be retained or abolished. As we have found in the submissions received, some people are prepared to accept one position provided that other factors are present or absent. The present law and practice relating to unsworn statements in criminal proceedings embodies a series of rules which some regard as counterweights each offsetting the effect of the others. We should also note that some approach the issue in rather different terms. For example, the question could be stated as whether the accused person should have a right to state his or her case without being subject to cross-examination. Put this way, the question does not assume that the statement must be unsworn.

4.2 For this reason we have concentrated our attention upon whether the present rules together constitute a “fair” balance, fairness in this sense being measured against the ten principles referred to in chapter 1. We consider the present situation to be highly unsatisfactory for a number of reasons, most of which have already been mentioned. It is significant that most of the many persons who made submissions advocating retention at the same time suggested that some changes should be made. There is uncertainty and confusion about several aspects of the law and practice surrounding the use of the unsworn statement; the legally acceptable form of judicial comment is unhelpful, dangerously ambiguous and certain phrases are capable of vastly different meaning depending upon the juror’s perception of them; the jury is left to speculate as to whether an accused person had the right to give sworn evidence and submit to cross-examination the judge is prohibited from dispelling certain misconceptions which the jury may have; and there is the anomaly created by s413A which puts an accused person who gives sworn evidence in a worse situation qua character evidence than one who makes an unsworn statement.

4.3 Whilst we shall necessarily address these matters in turn it should be emphasised that, for reasons similar to those mentioned in para 4.1, the proposals which we advance are also interdependent. As will appear, we are unanimous in concluding that an accused person should retain the right to present his or her case in a manner that is reasonably free from formal restraint and without exposure to cross-examination. We do so, however, on the basis that our other recommendations will ensure the important values embodied in our ten principles are given proper effect.

4.4 It is however the argument for abolition of the right that must first be addressed. This argument was strongly pressed by a number of practitioners experienced in criminal law including several senior judges. It has been accepted in a number of other jurisdictions (paras 3.10-3.12).

II. THE ABOLITIONIST ARGUMENT. CROSS-EXAMINATION

4.5 The detailed arguments for and against retention of the right to make an unsworn statement have been canyassed in our Discussion Paper. If they are also addressed in reports of other bodies which have examined the matter in recent years, most notably the reports of the Australian Law Reform Commission, the Victorian Law Reform Commissioner and the South Australian Select Committee of the Legislative Council referred to in Appendix A.

4.6 A number of features of the right and its abuse attract the attention of those who would abolish it the accused's right to make untrue claims attacking Crown witnesses or asserting grounds of defence without exposure to cross-examination the fact that the statement is not on oath or affirmation and the accusers facility to introduce inflammatory or irrelevant material without clear guidelines for judicial control. The persons who have submitted that the right should be abolished have however made it plain that they consider immunity from cross-examination is sufficient in itself to justify abolition. Accordingly, in this part of the chapter we consider whether the accused should continue to have the option of putting material before the court by way of a statement without thereby exposing the maker to cross-examination.

4.7 It is widely believed that cross-examination or the threat of cross-examination are key instruments in the pursuit of truthfulness in evidence. Whilst there are studies which question the accuracy of this assumption[1] it is one which we accept. If the matter were one of equality of treatment between prosecution witnesses and the accused and if the sole object was to discover, by any means, whether or not the crime was committed by the accused the case for retention would be insupportable. However, other factors must be put in the balance. A criminal trial is not a royal commission and the accusatorial as distinct from inquisitorial mode is part and parcel of our system of criminal process.[2]

4.8 We are unanimous in our view that an accused person facing trial by jury for a serious criminal offence should retain the option of putting material before the court by means of a statement which is not subject to cross-examination. Accepting the weight of the arguments summarised in the preceding paragraphs we consider that other factors outweigh them.

4.9 An accused person who has been put on trial and who is called upon to present his or her case following the conclusion of the Crown case is under considerable stress. Unlike other witnesses in the case the potential consequences of the trial for the accused person are serious. Whilst there are many who can do themselves justice in the witness box giving sworn evidence to some that would be an ordeal that could result in injustice. The accused person's awareness of the risk of conviction could lead the sceptical to detect the demeanour of dishonesty in what may be merely incapacity As Lord Reid has reminded us, "you must bear in mind that an innocent accused person is often stupid, he is often slow, he is often overawed and generally nervouse".[3] We also see merit in the proposition put forward in submissions to us that the ordeal of cross-examination may be no less of an ordeal for the sophisticated and well-educated accused person.[4]

4.10 We are concerned that there may be some people who, being innocent of the crime with which they have been charged but under practical compulsion not to choose the option of remaining mute would convict themselves by the way they would perform under cross-examination. We reiterate our principles 3 (para 1. 1 5) and 10 (para 1.22) about the need to minimise the risk of convicting the innocent and of placing the onus upon those who would recommend change adverse to the existing rights of accused persons. For these reasons and others which we will explain in the following paragraphs, we support the retention of the accused's right to make a statement without exposure to cross-examination. As we mentioned in para 4.1, this conclusion has been arrived at on the basis that our other recommendations, particularly those related to comment, are implemented.

4.11 The statement performs two useful functions that would be impaired if the right to make it were abolished:

> It can operate to help the jury focus attention on what are the real issues in the trial. In a Discussion Paper on *The Jury in a Criminal Trial* which is shortly to be published by the Commission we put forward the suggestion that the accused or counsel for the accused ought to be able to address the jury immediately after the Crown opening in order that matters not really at issue can be separated from those central to the case from the point of view of the accused person. There would be no compulsion to do so but we would envisage that many accused would choose to do so in order that the jury can know in advance what aspects of the prosecution case and what lines of cross-examination by the defence call for particular attention The unsworn statement tends (albeit poorly and belatedly) to perform a related function in that it puts before the jury the heart of the defence case. it enables counsel for the Crown (who must address first) to concentrate attack on the real issues. This is not only of value to the Crown but will also assist the jury to understand the real issues in the case.
>
> More importantly the statement is one, and sometimes the only, means whereby the accused can actually participate in his or her own trial basically on his or her own terms. As one person who made submissions to us put it: "The unsworn statement gives every accused his 'day in court', and allows him to speak his piece, however likely it is to be accepted by the jury.[6'] Even the process of evidence-in-chief can be daunting if it is interrupted by objections taken by opposing counsel. The usual techniques of cross-examination further operate to restrict the accused in the way he or she would wish to present evidence even though they may thereby get at the truth more effectively. Whilst we are not convinced that retention of this right to participate in the trial in this way is essential to maintain respect for the system of criminal procedure or prevent attacks upon the safety of the persons involved in it.[7] We nevertheless consider it to be an important value in itself-a recognition of the personal worth of the individual matched against the full majesty of the state.

4.12 There is a further important consideration which we consider lends support to the case in favour of retaining the right to make an unsworn statement not subject to cross-examination.[8] If the right is abolished, an accused person will have the options of giving evidence or remaining silent. In many cases the latter option is likely to be unrealistic. This could mean that the accused person will be virtually obliged to give evidence and be subjected to cross-examination. The likely consequence is that the accused person will be required to produce something of substance in reply to the Crown case. Putting this another way, the accused person will be required to "pass" the test of cross-examination. In our view, such a consequence may have a tendency to place a probative burden of a kind upon the accused person. The emphasis in the trial maybe shifted to become "what does the accused have to say about this allegations?". This not only means that the accused is compelled to respond, but worse, there is at least the implication that this response should be positive, impressive and persuasive. Whilst we acknowledge that in criminal trials where the prosecution case is a strong one, the accused person may have little realistic option but to give sworn evidence to rebut the strength of the Crown case, we do not consider that this should be effectively compelled by the law. it is a fundamental principle of our criminal law that the prosecution should at all times bear the onus of proving the guilt of the accused (para 1.17). Any procedural change which has the effect of diminishing the strict application of this principle should be resisted. We consider that the abolition of the right to make an unsworn statement could in practice appear to have this consequence.

4.13 We are 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 acquittals. Such devices will frequently be effectively dealt with by skilled and experienced Crown prosecutors in their final address. Experience, the submissions we have received and such information as is available (chapters) suggests that no greater rate of convictions (as if that were desirable *perse*) would be achieved following the abolition of the unsworn statement. This implies that juries may not be deceived by those accused who use the unsworn statement in the manner described.

4.14 We recognise that there may be sophisticated criminals who resort to this right and who, if the right is retained, would obtain an unjustified advantage because of our concern for those accused who have legitimate need of it. The same could be said about many rights conferred by the law in civil and criminal matters. Moreover, we are not convinced that accused persons who abuse the right to make an unsworn statement necessarily benefit from that abuse and in any event we feel that, subject to our other recommendations, the balance of advantage should be maintained in favour of the accused in this area. We do not favour a scheme whereby the "right" is available only to some accused at the trial judge's discretion (as has been recently proposed in South Australia: see para 3.11). It would be difficult to ensure that any such judicial discretion would be applied consistently. The invocation of the right should be left to individual accused persons and their legal advisers who are in a better position to assess the desirability of doing so than a trial judge who, having no information about the particular accused person and the case intended to be presented, would be tempted to stereotype particular categories and races of people as deserving of the "right" to make an unsworn statement. We are reluctant to encourage the development of different "classes" of people in the criminal courts.

4.15 Before leaving this particular topic we address one argument advanced by the proponents of abolition. This is the argument that the right is an historical anachronism which ought for that reason to be terminated.[9] In our view, unless the desire to have procedural law tidy and logical is elevated to a fundamental principle this argument has little weight in deciding what is the correct position to adopt today. What to one person is an anachronism may be, to another, a "very age-old and respectable institution".[10] We agree with the view, expressed by one person who made a submission that:

> About a century after the accused came to be entitled to give evidence the feeling seems to be developing that it is anomalous that the accused should have any other way of putting facts before the Court. What started as a law reform which conceded an additional right to the accused is apparently now seen as a reason for taking away his existing rights.[11]

The argument also ignores the fact that historical anomalies are capable of acquiring new functions which make their retention desirable. We consider that the unsworn statement falls into this category.

4.16 For these reasons we recommend that **subject to our other proposals, an accused person on trial before a judge and jury should retain the right to make a statement which does not expose the accused person to cross-examination.**

4.17 In para 2.19 we mentioned the apparent anomaly that the statutory embodiment of the right does not on its face preclude cross-examination by a co- accused. Whether or not this reflects the common law position and whether or not such position survives the statutory enactment of the right we think it desirable that the Act be clarified so as to preclude crossexamination by any party or questioning by the judge where an accused makes an unswom statement.

III. DISCOURAGEMENT OF UNTRUTHFUL STATEMENTS

4.18 As we noted in para 2.17, an unswom statement does not attract any sanction for perjury or false swearing. The only real deterrent is the risk that an obvious lie will be unfavourably received by the jury. In its Interim

Report on *Evidence,* the Australian Law Reform Commission has recommended that the accused should be liable for prosecution for perjury if false evidence is given in the statement.[12]

4.19 There is no inherent reason why an unsworn statement could not attract a sanction for false swearing. This is the position with false evidence of a child which is not on oath.[13] Alternatively, it would be possible to provide that the accused person should be required or permitted to take an oath or make an affirmation before making a statement and to provide further that the maker of such a statement should not be exposed to cross-examination.

4.20 The real issue, however, is whether there should be a sanction for making a false statement. The argument in favour of creating a sanction is that it might contribute to the truthfulness of the material advanced in the statement by deterring accused persons from telling lies. It is not right that the accused should be given a “free kick” to tell lies with legal impunity as partof a collection of rights designed to ensure any balance of fairness in his or her favour. By rendering the making of a false statement a crime, the criminal law would be performing its declaratory function. This is seen to serve a legitimate purpose irrespective of the approach taken by the responsible authorities to the prosecution of accused persons alleged to have made a false statement.

4.21 The contrary viewpoint looks at the practical realities of the situation. Whilst the principles of double jeopardy do not preclude the prosecution for perjury of an accused person who gives false evidence,[14] the fact is that such prosecutions are rarely if ever brought in New South Wales. If the law were altered so as to render the making of a false statement a criminal offence it would be likely that defence counsel would feel obliged to draw attention to this fact if only in an endeavour to minimise what is already seen as the invidious distinction between the value of sworn evidence and that of the unsworn statement. Counsel would not be doing his or her client justice without referring to features of the unsworn statement which may increase its stature in the eyes of the jury. Bearing in mind the practical reality that there is no risk of prosecution such an approach might be seen as technically legitimate but as actually allowing the jury to be misled. A judge might then feel inclined to make some comment to the jury on the issue but would probably be precluded from doing so. A final practical consideration advanced by those who hold the view that there should be no change in the present law is that, in all probability, few accused personswho were determined to lie in criminal proceedings would be deterred by the presence of a sanction.

4.22 The majority of us (Mr Byrne, Mr James, Mr Mason, Miss O’Connor and Mr Justice Roden) consider the latter arguments compelling. We think that little if anygood would come from making it an offence to make an untrue statement and that such a change in the law could lead to injustice. We therefore recommend that **there should continue to be no legal sanction for giving false evidence in the course of an unswom statement.**

4.23 The minority (Judge Mathews and Mr Sackville) prefer, on balance, the arguments summarised in para 4.20. It is considered that unless there were no point at all in having crimes such as perjury and false swearing there is no reason why the accused who seeks to make a positive contribution to the material available to be considered on the question of guilt ought not to be exposed to a prosecutiorrif he or she is found to be lying. Mr Sackville would also wish to question the appropriateness of the current policy not to prosecute persons who give false sworn evidence at their own trial.

IV. EVIDENTIARY STATUS OF THE UNSWORN STATEMENT AND METHODS OF CONTROL

A. The statement as evidence

4.24 As we pointed out in paras 2.25 and 2.27, what is advanced by way of unsworn statement has evidentiary value and is part of the material before the jury in relation to the accused who makes the statement. It can be used to prove facts in issue, even if inconsistent with other sworn evidence; and can be contradicted in certain circumstances by evidence called in reply by the prosecution.

4.25 We consider that this result which is clearly established by the modern authorities, [15] should be reflected in the legislation. We appreciate and intend that this and other changes which we propose should mean that the "formula" judicial direction which is set out in para 2.30 will no longer reflect the true legal position. We shall consider these matters in more detail below.

B. Co-accused

4.26 The current law in New South Wales is that the material contained in a statement which is not subject to cross-examination is not evidence in the case of an accused person tried jointly with the maker of a statement. That is the rule whether the evidence is favourable or unf avourable to the case of the co- accused[16] We consider that this should remain the law, because the co- accused does not have the right to cross-examine to challenge unfavourable material and because of the difficulty of sorting out what is "favourable" or "unfavourable" material. (However we should note that this raises a wider problem which affects joint trials. Whilst the law is clear that an unsworn statement or an out of court admission made by one accused is not evidence for or against a co-accused, it may be unrealistic to assume that juries can apply this law accurately even when they are property instructed. This wider problem concerns the conduct of joint trials rather than the unsworn statement in isolation.)

4.27 Such a rule would not prevent an accused person from adopting a statement made in court by a co-accused. In that event the material adopted becomes evidence in the case of the person who adopts it, and may be used either for or against that person.

C. Application of Rules of Evidence

4.28 As we pointed out in para2.26 an accused person probably has no legal right to include irrelevant or hearsay material in the statement although by way of indulgence and because of the difficulty in controlling material given by direct statement without prior questioning, considerable latitude may be given, We consider that this is an appropriate position and would not seek to change it. From our experience it would be rare for important material relevant to the defence case to be rejected on formal grounds. One person who made submissions to the Commission[17] suggested that one of the reasons why the unsworn statement should be retained is that it enables an accused person to inform the jury of evidence that could have been given by a now deceased or unavailable or hostile witness. We favour retention for other reasons. We do not wish to encourage the presentation of material which would not be admissible as sworn evidence. If the general rules of evidence, particularly the hearsay rule, cause injustice they do so for all litigants regardless of whether they would wish to give evidence or make an unsworn statement: a Report primarily concerned with the use of unsworn statements is not the proper place to address such matters of general significance.

4.29 This still leaves open the method used to control the content of the statement. The Australian Law Reform Commission has envisaged that the prosecution should be entitled to object to inadmissible material in an unsworn statement and that the judge should be required to rule on such an objection.[18] It is not entirely clear how it is intended that this would be done because the draft Evidence Act proposed by that Commission[19] seems to envisage that the primary manner of giving "unsworn evidence" is by the traditional method of making a statement. The draft act does how ever provide that after unsworn evidence has been given a legal practitioner appearing for an accused person may, with the leave of the court question the accused person as though in examination-in-chief.[20] Indeed it would be possible for the totality of the unsworn evidence to be given in the usual manner of giving evidence-in-chief. This would enable the admissibility of proposed evidence to be challenged in the traditional manner of objection to the question put by counsel to the witness. We do not favour such a departure from the existing practice as to the manner of making an unsworn statement. As we observed in para 4.11[21] a principal reason for retaining the right to make an unsworn statement is to enable the accused person to contribute to the proceedings on his or her own terms. The normal process of eliciting evidence-in-chief necessarily involves interruption and control.

4.30 Alternatively the accused could be required to provide the court in advance with a copy of the text of the proposed statement so that irrelevant and inadmissible material could be deleted. it would probably follow that he or she would have to be permitted to read from the edited statement. This would be a departure from the conventional practice in this State which requires the accused to make the statement without the benefit of notes. We do not consider that the trial judge should be required as a matter of course to canyass the intended content of an unsworn statement which an accused person intends to make in court. It would have a tendency to involve the judge too closely in the presentation of the defence case and may appear in some cases as if the judge is giving legal advice to the accused person In stating this conclusion we do not wish to be understood to be saying that such a course will always be inappropriate. We think it desirable that counsel for the accused should invite the trial judge to determine in advance the admissibility of matters which are in doubt. It is the practice in this State for counsel to assist in the preparation of an unsworn statement and for occasional "rulings" to be sought in the absence of the jury concerning doubtful material intended to be included in it. This is a matter that can be left for the discretion of the trial judge to exercise as he or she thinks fit in the circumstances of an individual case.

4.31 Judges will make "judicious" interruptions if an unsworn statement threatens to stray too wide of the mark. Any risk of such interruptions being excessive is curtailed by the exercise of the judge's overall duty of fairness and the more practical restraint of unwillingness to appear unfair in the eyes of the jury. Where inadmissible material emerges in the course of an unsworn statement judges can direct the jury to disregard that material just as they do in relation to inadmissible material that emerges in sworn evidence.

4.32 In our view there exist adequate powers to control and minimise the effects of the intrusion of inadmissible material into an unsworn statement. The fact that they are not used extensively is due to an indulgent latitude that is frequently given to an accused person in these circumstances. In one area the judge is required to direct the jury to disregard inadmissible material: that is where a person charged with a sexual offence makes an unsworn statement containing prohibited material relating to the previous sexual experience of the complainant.[22] We have considered whether the principle embodied in this last mentioned provision ought to be made one of general application, but do not feel that it is appropriate that judges be obliged to instruct the jury to disregard any inadmissible material that intrudes into an unsworn statement. There is often a risk that an instruction of this nature only emphasises the material and we think it best to leave the matter where it is at the moment namely as a discretionary power capable of being exercised whenever the trial judge thinks necessary to do so.

D. Proving and tendering exhibits

4.33 Under the present law where the statement is unsworn, the question arises whether the accused can put into evidence any document or object duty "proved" by the statement. If the proposed exhibit is hearsay or irrelevant it can and should be excluded and the law so provides, although an accused maybe permitted to put the matter before the jury by way of an indulgence.[23] But what if it represents something which if "proved" by sworn evidence could thereupon be tendered In *R v See* Lun[24] the New South Wales Court of Criminal Appeal by majority held that such a document or object could go to the jury for inspection not "as evidence" (because it had not been identified by evidence on oath) but as "part of the statement"[25] or "as an exhibit to the statement and not as evidence".[26] The Full Court of the Supreme Court of Victoria has more recently come to an opposite view and ruled that such documents should not go to the jury, except as a matter of indulgence.[27]

4.34 If, as we propose, the status of the unsworn statement as evidence receives statutory recognition then it would seem to follow that documents and objects that are relevant and otherwise admissible and duly proved by such evidence should be admitted as exhibits in the ordinary manner. That conclusion appears to us to be logically consistent and appropriate. It should be remembered that the Crown would expect to be permitted to reopen its case to tender evidence in reply to anything unexpectedly arising in the course of the defence case.[28]

E. Recommendations about evidentiary status

4.35 We therefore recommend that

(a) the status as evidence of material advanced by way of an unswom statement or exhibits duly authenticated by such a statement should be confirmed by statute;

(b) such material should not be evidence for or against any other accused person unless it is adopted by that other person;

(c) otherwise, the law as to the evidentiary status of an unswom statement should be unchanged.

V. SHOULD THERE BE A RIGHT TO MAKE AN UNSWORN STATEMENT AND ALSO GIVE SWORN EVIDENCE?

4.36 We have noted (para 2.9) that the law in New South Wales permits an accused person to make an unsworn statement and also, later, to give sworn evidence. It is our observation that increasing numbers of accused persons exercise this right to give both kinds of evidence. Various reasons suggest themselves f or the practice although they are not mutually exclusive:

An accused particularly one who is knowledgeable about court procedures and the limitations of the rules of evidence, may make an unsworn statement in order to put irrelevant or inadmissible material before the jury and then offer sworn evidence. in the sworn evidence the accused swears to the correctness of the material advanced in the unsworn statement.[29] By giving sworn evidence the accused is able to avoid what is seen as the unfavourable impact of the judicial "comment" permitted by the "formula" direction concerning an

unsworn statement (para 4.51). In giving both kinds of evidence the accused will have demonstrated in a graphic way the difference between the two. The accused s counsel is then able to make much in submissions about the accused having exposed himself or herself voluntarily to the rigours of cross-examination.

An accused may overlook some vital matter in the unsworn statement, or the later evidence of witnesses called by that person may be so damaging that it is felt necessary to enter the witness box in an attempt to retrieve the position.[30]

One of two or more accused who presents his or her case first by way of an unsworn statement may later be confronted by the case of a co-accused who makes sworn or unsworn assertions which are highly damaging to the position of the first accused. Normally a party will not be allowed to reopen once having closed his or her case, but where new and unexpected material emerges when another party later presents his or her case, leave may be given to the first party to reopen.[31] The first party is precluded from making a second unsworn statement (see para 2.8) and may thus be driven to seeking leave to reopen the case for the purpose of giving sworn evidence.

4.37 In most jurisdictions where there is or has been the right to make an unsworn statement the right has been an alternative to giving sworn evidence. Several of the people who made submissions to us have argued that the availability of a right to give both kinds of evidence in New South Wales is a legislative oversight and that the abuses identified in the first example given in the preceding paragraph are by themselves a sufficiently serious irregularity to justify abolition of the cumulative right. It is argued that the right of the Crown prosecutor to cross-examine on both the material in the unsworn statement and the sworn evidence (para 2.9) is insufficient to overcome the injustice which may be created by an accused person who takes advantage of presenting both kinds of evidence. We believe that there is much weight in these criticisms and that this practice has a tendency to cause confusion to the jury which may have to assess the credibility of different parts of the same witness' evidence in different ways.It is also clear from an earlier part of this chapter (paras 4.28-4.32) that we do not favour any means whereby an accused person may, except byway of indulgence, introduce material into the trial which would be inadmissible if it were given by sworn evidence. In any event we consider that judges and Crown prosecutors (by refraining from objecting) extend considerable indulgence to accused persons who give sworn evidence to lead material relating to matters such as background or character which may be of marginal relevance in a strict sense. It is not valid to say that it is only by making an unsworn statement that an accused person can put this apparently valuable evidence before the jury.

4.38 The contrary argument is that the law, whilst recognising the right of the accused person to make an unsworn statement should nevertheless encourage the giving of sworn evidence. This enables the jury to have the advantage of assessing the accused's evidence in the same manner as that given by other witnesses. The accused should also be allowed to present at least part of his or her evidence in an unrestricted way for the reasons given in the second part of para4.11. Any risk of confusion can be met by an appropriate explanation to the jury.

4.39 We have not found this an easy issue-Ultimately, the majority of us consider that the arguments favouring general abolition of the cumulative right preponderate. However because we recognise the need to accommodate the second and third types of situations referred to in para 4.36, we adopt the suggestion put forward by the Australian Law Reform Commission in its Interim Report on *Evidence,*[32] namely that the court should, in exceptional cases such as those mentioned in the last two subparagraphs of para 4.36, have the power to allow an accused who makes an unsworn statement later to give sworn evidence. We therefore recommend that an **accused person who makes an unsworn statement may not also give sworn evidence unless the judge gives leave to do so; and that if sworn evidence is given cross-examination may extend to evidence given in the unsworn statement.** Mr Sackville takes the view that there are no compelling reasons

to alter the current situation in which the accused can make an unsworn statement and then give sworn evidence and be tested by cross-examination.

VI. RAISING THE ISSUE OF THE ACCUSED PERSON'S CHARACTER

4.40 The present law as to when the Crown may lead evidence of the accused persons bad character is summarised in paras 2.20-2.23. We noted (para 2.20) that the Crown may call evidence in reply where an accused person raises the issue of his or her own character in an unsworn statement and that no different position prevails where the accused does this by sworn evidence. We consider that there should be no change in this position.

4.41 We also noted (para 2.2 3) that there is an apparent anomaly in the present law whereby in accused person who gives sworn evidence may, by virtue of ss413A(4) and 413A(5) of the Crimes Act 1900, be liable to have his or her own bad character revealed in circumstances where an accused who makes an unsworn statement is not. There is no justification for allowing the accused person who gives unsworn evidence to have such an advantage when compared with one who gives sworn evidence. The statutory confirmation of the evidentiary status of the unsworn statement which we propose (para 4.35) only underlines the need for consistency on the question of character. One further criticism of the present law is that it may operate to deter some accused from giving sworn evidence, a consequence which we consider. Undesirable if the accused is otherwise prepared to do so.

4.42 It is appropriate that 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 Provided that the conditions laid down in s413A(4) (para 2.22) or s4l3 A(5) are satisfied the same consequences should follow regardless of whether the accused gives sworn evidence or makes an unsworn statement. Where the accused gives sworn evidence**,** and attacks the prosecution witnesses, the consequence is that in an appropriate case the shield from cross-examination by the Crown as to bad character on the issue of credit is cast aside. Since, however, the main incident of the unsworn statement is that the accused is not liable to cross-examination the appropriate consequence should be that the Crown would be permitted, subject to such conditions as the Court thinks fit to lead evidence as to the accused's bad character in so far as it goes to credit. We therefore recommend that **where the provisions of s4l3A of the Crimes Act, 1900 would apply to an accused person who gives sworn evidence they should be extended to a person who gives evidence only by way of an unsworn statement. 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.** In some cases it will be appropriate that such evidence be led before the case of the accused person. In others, eg where the accused person first raised an issue in the course of an unsworn statement, evidence on the relevant issue would need to be led afterwards.

4.43. In our Working Paper on *Evidence of Disposition* (1978) paras 5.6-5.7 we expressed the view that s413A(4) ought to be amended to allow the accused to attack the prosecution with impunity The basic argument is that since the Crown has the onus of proof, it seems unjust that an accused person who may have quite legitimate grounds for attacking the general credibility of a prosecution witness cannot do so without thereby exposing his or her own general bad character with the attendant risks which may not be avoided even where an appropriate direction is given. To attack the credibility of a prosecution witness does not necessarily involve asserting one's own good character. This Report, however, is not the place to reach a final view on this topic.[33] As we indicated previously[34] we shall proceed here on the basis that s413A(4) stands unrepealed. On that basis the anomaly

which we have identified and discussed calls for a remedy and the one we have proposed above seems appropriate.

VII. JURY DIRECTIONS AND COMMENT

4.44 Under the present law the unsworn statement of an accused person has four main incidents: it is not on oath and therefore not subject to any of the sanctions for perjury or false swearing, it is not subject to cross-examination: it has a probative capacity in the case of the accused who makes it in the sense that the jury should take it into account ill their deliberations it' they accept its truthfulness or are not satisfied of its untruthfulness, and, though theoretically subject to the rules of evidence, nevertheless can be delivered in a manner that may make it difficult to control so far as compliance with those rules are concerned. As will be clear from other parts of this Report we consider that the first two incidents, particularly the absence of cross-examination, result ill important differences between the position of an accused who makes an unsworn statement and one who gives sworn evidence. These differences are generally perceived by judges, legal representatives and accused persons although naturally opinions vary oil the significance and extent of the differences.

4.45 it has been held to be necessary for the trial judge to inform the accused person of the right to make an unsworn statement.[35] Our understanding is that in practice this is only done in the case of unrepresented accused and this necessarily takes place in the absence of the jury.

4.46 Accordingly, under the present law the jury will only be informed about any of the incidents of the right or its consequences in a trial in which the right is exercised if:

the accused raises the matter in an unsworn statement or final address;

a co-accused raises the matter in final address,

the prosecution in its final address refers to the fact that the accused's statement was unsworn and not subject to cross-examination; or

the judge mentions the matter in the summing up.

4.47 It seldom if ever occurs that an accused or counsel for an accused mentions any of these distinctive incidents. This is due to the fact that it is usually perceived that the jury are likely to be unimpressed by being told that the accused could have given sworn evidence-even if the accused was someone who had legitimate reasons for declining that option. For similar reasons one co-accused who also opted to make an unsworn statement is unlikely to draw attention to the fact that another accused took the same course.

4.48 However, if in a joint trial one of the accused persons chooses to give sworn evidence it is highly likely that an invidious comparison will be drawn between ally accused who made in unsworn statement and the position of the accused who gave sworn evidence. Depending upon the order in which the various accused exercised their respective options and whether or not exculpatory evidence advanced by the accused who gave sworn evidence tended to incriminate the accused who did not, there is a capacity for extremely damaging comment to be made.

The law does not prohibit this.[36] However the prohibition imposed by s407(2) of the Crimes Act precluding the trial judge from commenting on the failure of an accused person to give sworn evidence, is lifted by a proviso in the following terms:

> Where two or more persons are being tried together, and comment is made. by or on behalf of any of them upon the failure of any of them, or of the husband or wife, as the case may be, of any of them, to give evidence, the judge may make such observations to the jury in regard to such comment or such failure to give evidence as he thinks fit.

4.49 Apart from this slightly exotic instance of co-accused taking different options and Comment on this being made by defence counsel in their address, the first occasion on which the jury is informed about the distinctive incidents of an unsworn statement will be in the final address of the prosecution or in the judge's summing up. Whilst the highest authorities seek to establish the extent of what may and may not be said, the existing law and practice is in our view highly unsatisfactory for a number of reasons which we shall explain.

A. Permitted observations

4.50 Both the prosecutor and the trial judge may advert to the fact that the statement permitted by s405 is unsworn and not subject to cross-examination and thereby suggest to the jury that it may not be considered as persuasive as the evidence of witnesses who gave sworn evidence and subjected themselves to cross-examination. In a trial where the accused person has made an unsworn statement the direction which is given by judges when summing up to the jury is commonly in the following terms:

> That statement is something which the law requires you to take into consideration together with the evidence, but it is not in itself evidence in the same sense as the statement of a witness given on oath; it is not subject in any way to test by cross-examination. You should take it as prima facie a possible version of the facts and consider it with the sworn evidence, giving it such weight as it appears to be entitled to in comparison with the facts clearly established by evidence.

This is composite based on the directions approved in the High Court in *Jackson v The King*[37] and those suggested by Griffith CJ in *Peacock v The* King.[38] Whilst the New South Wales Court of Criminal Appeal has frequently and consistently approved it and warned against departure from it,[39] the terms of this direction have not always found favour with judges. As Windeyer J said in *Bridge v The Queen*[40] adherence to the "formula" suggested in *Jackson's* C*ase* is "legally safe, although it is hardly logically satisfactory".

4.51 In our view there are certain aspects of the"formula" direction which are unsatisfactory.

> It is dangerously ambiguous as to the evidentiary status of the unsworn statement. The authorities are, in our view, quite clear that material advanced by an accused in an unsworn statement has probative or evidentiary effect (para 2.25) so far as that accused is concerned. Yet the opening and closing phrases of the formula compares the statement with "the evidence", although other parts of the formula suggest that it is "evidence"

albeit not “sworn” evidence. As will become apparent (para 4.63) we support the jury being told of the relevant distinctions between sworn evidence and the unsworn statement (ie the oath and the liability to cross-examination). It is however in no way helpful to a jury to suggest other distinctions, which are non-existent and meaningless, such as material which should be taken into account because it is evidence and material which. though not evidence, should nevertheless be taken into account.

The language of the direction is unbalanced. On the one hand it refers to the unsworn material as a “possible version” of the facts and oil the other hand to facts “clearly established by the sworn evidence”. The denigration of unsworn evidence is inescapable. It is well established that it is for the jury to attach such weight to the unsworn material as it considers fit.[41] It is open to them to accept the unsworn evidence and to reject sworn evidence, even where the latter is not subject to a challenge. It is traditional to find in the portion of a summing up which deals with the sworn evidence explicit reminders that the facts are the exclusive province of the jury and that any judicial comment is not intended to suppliant the view of the facts which is formed by the jury. The “formula” direction contains adverse “comment” without any such reminder.

Some of us hold the view that the “formula” direction implies that which it is supposedly prohibited from doing (see paras4.53 and 4.55), namely that the accused person who makes a statement has the right to give sworn evidence. In Our view it is impossible to formulate a collection of words designed to distinguish between unsworn and sworn evidence which do not at least indirectly convey the prohibited information As Windeyer J has said in the High Court, if an accused person makes an unsworn statement:

> the judge should, it has been held, direct the jury in their evaluation of it-by telling them that they are to take it into consideration and give it such weight as they think fit along with the sworn evidence, but that it is not evidence in the same sense, as it lacks the sanction of an oath and the test of cross-examination. I find it hard to see how in doing this the judge can ever be sure that his remarks do not amount to a comment on the failure of the accused to give evidence.[42]

As we point out below (para 4.54) judges are frequently tempted to depart from the “formula”. This in our view reflects judicial dissatisfaction with the current law which is perceived to to be unrealistic and unsatisfactory.

4.52 None of these criticisms is capable of easy remedy. We do not think it desirable to prescribe some statutory form of an appropriate summing up. This is not the place to discuss the general topic of standard form directions, but we should record the view that this particular topic does not call for singling out. In any event our recommendations that the evidentiary status of the unsworn statement should be confirmed (para 4.35) and that the prohibition on judicial comment should be modified(para 4.62) would both have the effect of rendering the present “formula” direction unnecessary and inappropriate.

B. Prohibited comment

4.53 Section 407(2) of the Crimes Act, 1900 prohibits any comment by the judge or by counsel for the Crown on “the failure of an accused person to give evidence”. This prohibition was enacted in the light of the decision of the Privy Council in *kops v The Queen.*[43] Although an accused person was afforded the right to give evidence in trials of indictable offences in 1891 (para 2.35), it was recognised that certain accused would feel prevented from availing themselves of that right and would prefer to exercise the statutory right previously enacted in the predecessor to s405 to make an unsworn statement:

> Hence the legislature determined to prevent the enactment [of the right to give evidence], if not used by the prisoner, from being employed as a means of inculpation. This leads ... to the conclusion that sub-sec 2 of

> sec 407 is a limitation of the power of comment only so far as relates to the rest of that section and contains no prohibition regarding sec 405. It is necessary to bear this distinction in mind. So far as the latter-mentioned section is concerned, the law remains unchanged, and comment may still be made, either that the prisoner has not made any statement as permitted by that section, or that the statement, if made under it, is not on oath and therefore may not be considered as weighty as the evidence of witnesses under oath. If, however, reference, direct or indirect, and either by express words or the most subtle allusior and however much wrapped up, is made to the fact that the prisoner had the power or right to give evidence on oath and yet failed to give, or in other words, "refrained from giving", evidence on oath there would be a contravention of the sub-section now under consideration. The question whether the law has been so contravened must depend in each case on the words used and the circumstances in which they are used.[44]

4.54 Despite the safety of adherence to the "formula" the prohibition in s407(2) has provoked a continuing spate of litigation. Time and again trial judges have, not surprisingly, baulked at the ritualistic, ambiguous, and unhelpful nature of the approved direction and have added comments directed at the particular circumstances of cases before them. The high incidence of appeals based on this ground suggests that the law on this subject is not clearly stated and, if it is, not consistently applied. Appellate courts have frequently been finely divided on whether the additional material constituted prohibited comment.[45]

4.55 It has been held that s407(2) prohibits:

> any expression designed to attract or which would necessarily attract, the attention of the jury to the fact that an accused person competent to give evidence in the witness box did not do so.[46]

Thus it is prohibited comment to point out that the accused was at liberty to give evidence on oath but refrained from doing so,[47] although the approved formula permits the statement to be contrasted with evidence given on oath and subject to cross-examination. It is also improper for reference to be made to the fact that the accused made the statement from the dock-if that is where he or she stood to make the statement.[48]

4.56 It is however clear that to convey certain types of information to juries will also constitute prohibited comment In *R v Greciun-King*[49] a conviction was quashed in circumstances which clearly illustrate the absurdity of the present law. The trial judge received the following query from a juror:

> All witnesses called by the Crown and by the Defence have given their evidence before the jury on oath since the jury was selected. I do not recall Mr Greciun-King taking the oath. Did the Court require that Mr Greciun-King take the oath before pleading, that is before the jury was selected? If so was Mr Greciun-King precluded from taking the oath by reason of his unwillingness to enter the witness box?

The judge answered the query by simply informing the jury of the three courses open to an accused person including the right to "give evidence on oath from the witness box like any other witness". He reminded them that no adverse conclusion should be drawn from the fact that the accused decided to make a statement rather than give evidence. Whilst this direction did not in any respect mis-state the effect of the law it was held in the context of the jury's question to constitute a reference to the fact that the accused had not given evidence on oath and therefore to be in breach of the prohibition in s407(2). Street CJ remarked that:

> this case exemplifies the practical difficulties that are presented by the prohibition in s407(2) ... Unless and until Parliament amends the statute a trial judge is forbidden to tell a jury what the law really is even when as here, he is asked a specific question by the jury. This has been suggested to be tantamount to requiring juries to determine cases with a partial blindfold upon the true state of the law. There is much to be said in favour of bringing the administration of justice out into the open Those concerned in the conduct of criminal trials-certainly the judges, if not indeed both judge and counsel-should be freed from this artificial fetter which can only serve to mislead the jury as to what the true state of the law is. His Honour, in straight forward and wholly correct terms, answered the specific question the juror had asked: he told the jury exactly what the law was. Understandably he found it distasteful to the point of being unacceptable, to equivocate with or mislead the jury as to the true state of the law. It is an absurd paradox that, by having accurately stated the accusers rights as enacted in the Crimes Act the judge has caused the trial to miscarry. Statutory secrets enforced on the courts and on juries such as s407(2) do less than justice to the commonsense and fairness of juries.[50]

Lee J said:

> It is difficult to perceive a sound reason based upon considerations of justice for withholding from a jury that an accused person has a right to give evidence on oath but the present case illustrates that on an important matter a jury must, if the law is to be applied correctly, be kept in a state of deception. The only course that was open to the judge in regard to the jury's question in the present case, unless he were to make a forbidden comment and cause the trial to abort, was to tell the jury that the question was irrelevant to the matters the jury was called upon to consider, or state that the jury should not concern itself with the subject matter of the question that had been asked or put forward some similar evasive answer, or simply state that he would not answer the question. Judge Sinclair took the only proper course, in my opinion, by refusing to dissemble and by giving a frank honest and correct answer to the juror's question. The jury by the question asked had recognized that the failure of the accused to give evidence could have significance in deciding where the truth lay-as it undoubtedly could have-yet s407(2) operates, indeed is designed to operate, to prevent the jury knowing that he could have given evidence if he had wished to.
>
> Justice with blinkers on can hardly be called justice. Procedures applying in regard to the conduct of a criminal trial should be capable of explanation by the judge to the jury without resort to concealment of the truth of the situation.[51]

4.57 In our view the state of the current law, as revealed by these judgments, is highly unsatisfactory. The position exposed by *R v Greciun-King* is absurd, as the criticisms advanced by Street CJ and Lee J make plain.[52] It is based on a presumption of ignorance by the jury that is probably ill founded. The chance that no juror is aware of the accused's right to give evidence must be small indeed. Significant numbers of accused give sworn evidence and, even if none of the jurors has previously been in a trial where this has occurred it is likely that at least one of them will have read in the newspapers one of the widely reported cases in recent years where the accused gave evidence and was cross-examined. There is an even greater risk of serious injustice if jurors, being uninstructed, form an erroneous belief as to the true legal position. For example, in discussions we have had it has been reported to us that some jurors believed that the accused could not give sworn evidence because of prior criminal convictions. On the other hand we have been told of jurors believing that the accused was compelled to stay in the dock throughout the trial and for that reason was not entitled to give sworn evidence. It is quite wrong that a jury should, in performing what is already a peculiarly difficult task be left to speculate upon such matters as whether the accused was sworn in their absence, whether the accused had no right to give sworn evidence, or whether the Crown did not cross-examine the accused because it had nothing to confront the accused with in response to his or her version of what took place. In our opinion, this artificial practice of trying to conceal from the jury a fact that is probably known to most of the jurors should be abandoned.

4.58 In Victoria, the judge is expressly authorised to comment where an unsworn statement is made. In South Australia and Tasmania there is no legislative provision prohibiting judicial comment. In England, Queensland and Western Australia prior to the abolition of the right to make an unsworn statement, judicial comment was also permitted. in these jurisdictions there is. in addition to the general principles as to fairness in summing-up, a body of law discussing the extent and limits of judicial comment on the topic.[53] The Australian Law Reform Commission has in its Interim Report on *Evidence* recommended that the trial judge be able to comment on the failure of the accused to give sworn evidence but the comment shall not suggest that-

(a) the defendant did not give sworn evidence, or offer himself or herself for cross-examination because the defendant believed that he or she was guilty of the offence concerned, or

(b) unsworn evidence is, by reason only that it is unsworn evidence or that it was not subject to cross-examination necessarily less persuasive than sworn evidence.[54]

4.59 It may be noted that (a) has some resemblance to the recommendation of the Criminal Law Review Division which is referred to in para 2.39. The Commission considers that such a proviso is so obyious that it does not require legislative underpinning, although it might be otherwise if one were attempting to codify the law of evidence in this field.

C. Recommendations on judicial comment

4.60 We are unanimous in the view that the situation exposed by *R v Greciun-King* (para 4.56) should be remedied. We consider that the jury should not be left to speculate about theposition adopted by the accused and that it should be permissible for the judge to inform the jury about the options open to the accused. This would preclude the uncertainties and dangers of injustice mentioned in para 4.57. We envisage that the jury would, in the presence of the accused, be informed of the various options and their legal characteristics immediately before the commencement of the case for the accused although it would be open to the judge to inform the jury at any other stage of the trial. Since most accused persons are represented by counsel or are otherwise aware of their rights it seems unduly artificial that the remarks should be addressed to the accused and not to the jury. Naturally information of this nature, if appropriate, could be repeated in the summing up or, as in *R v Greciun-King,* in response to a question from the jury. Mr James records that he would prefer that the jury should only be instructed on the matter if, as in *R v Greciun-King,* a question is raised indicating that the issue has become a live one in the minds of the jurors. He is, however, prepared to concur in the broader approach to which the other members of the Division are committed.

4.61 We do not propose that it should become mandatory for such information to be provided but expect that this would happen as a matter of course. An amendment to s407(2) is required because *R v Greciun-King* establishes that for the judge to provide this type of information will in an appropriate context amount to “comment” about the failure of the accused to exercise the right to give sworn evidence.

4.62 For these reasons we recommend that 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.**

4.63 In cases where the accused person makes an unsworn statement it would continue to be appropriate for the judge to inform the jury of the incidents of such evidence, namely its unsworn nature and the fact that the maker is not subject to cross-examination. No statutory amendment seems necessary to achieve this.

4.64 The statutory affirmation of the evidentiary status of the unsworn statement which we recommend (para 4.35) and the repeal of the prohibition on judicial comment in s407(2) should lead to the demise of the "formuld' direction which is based on the need to have a safe course whereby the judge can steer as close as possible to the wind of the judicial prohibition whilst still providing some assistance to the jury. With the intended extinction of the existing "formula" those unsatisfactory features to which we drew attention in para 4.51 will naturally disappear. This would, we believe, lead to juries being invited to consider material advanced by way of an unsworn statement in a realistic way.

4.65 Each of these consequences should follow from the recommendations made earlier in this Report and from the repeal of that portion of s407(2) which relates to judicial "comment". The question arises, however, as to whether this should be replaced by some form of legislative restraint upon types of judicial comment which might be considered likely to be made that would be misleading to the jury or unfair to the accused person. On this question the Division finds itself in disagreement.

4.66 In the view of a minority of members of the Division (Mr Mason, Mr Justice Roden, and Mr Sackville) there should be no statutory proscription of any particular type of judicial comment. In their opinion the argument that judicial comment should be restricted by statute proceeds upon an assumption that judges are likely to fail in their overriding duty "to secure for the accused a fair trial according to law"[55] and that appellate courts would be unable to check such failings. In jurisdictions where there is no proscription upon the form of judicial comment the courts have worked out guidelines as to what are proper forms of comment.[56] Rules prohibiting certain types of comment necessarily lead to fine distinctions which can lead to disputes and appeals. More importantly, they mean that undue attention will be concentrated upon whether or not a particular summing up infringed a particular prohibition rather than whether it constituted a generally fair and appropriate direction to the jury. They may operate to preclude a trial judge from giving full assistance to the jury in performing its difficult task. We consider that the jury should get information and assistance, where appropriate, about the nature of the options open to the accused person and the manner in which such matters apply to the facts of the particular case. As the High Court said in *Alford v Magee* it is a "great guiding rule" that it is:

> of little use to explain the law to the jury in general terms and then leave it to them to apply the law to the case before then-L.. the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case.[57]

Whilst it is possible to envisage types of comment (such as canyassing the reasons why a particular course is taken where there is no evidentiary basis for doing so and where the matter has not been raised in addresses) which would be improper, the minority reiterate that the courts overriding duty to ensure a fair trial is, in their view, a sufficient restraint and that to prescribe particular prohibitions is likely to create rather than solve difficulties.

4.67 However the majority of the Division (Mr Byrne, Mr James, Judge Mathews and Miss O'Connor) consider that it is appropriate that there should continue to be a clearly stated objective standard which marks the point

beyond which a direction to the jury becomes improper. In jurisdictions where judicial comment is or was formerly permitted there are enough reported instances of what is considered to be unnecessarily inflammatory comment to lead the majority to the view that the specification of such a standard is desirable.[58] The majority particularly, have in mind comment, which invites the jury to speculate why the accused chose to refrain from giving sworn evidence where that issue has not previously been canyassed in evidence or addresses. The risk of such comment being made could only have the effect of putting strong pressure upon accused persons generally to forego their right to make an unsworn statement. Despite the development of a judicially approved formula which might set out the limits of appropriate comment, there would always be the risk of transgression. Past experience shows that risk to be a real one. If unrestrained judicial comment is permitted, experience suggests that different judges would approach the matter with entirely different preconceptions about the propriety of making an unsworn statement. In other words it is difficult to be sure of consistency of treatment without some statutory prescription.

4.68 The majority has approached this issue by asking the question "Is there any form of judicial comment that will always be unfair or undesirable and of which there is at the same time a real risk that it might be given?" If the answer to both these questions is yes, then that form of comment should be prohibited. If the answer is no to either, we would agree with those arguments in para 4.66 and join the minority. Our answer is yes to three types of "comment". The types of judicial comment which in the view of the majority, should be prohibited by legislation are those discussed below:

It should be remembered that the existing prohibition in s407(2) of the Crimes Act, 1900 is not confined to comment when the accused person makes an unsworn statement. It extends to the situation where the accused exercises the right to stand mute. Indeed it was in order to cater for this situation that the prohibition was primarily designed: s407(2) stands as a proviso to an enactment making the accused person a competent witness. It is common place for judges to instruct juries that they should draw no adverse inference from the fact that an accused person stands mute.[59] We consider this an appropriate direction and for that reason we feel that any direction which ran contrary to it would be objectionable. It is therefore recommended that **a judge shall not comment upon the failure of an accused person to give evidence.** Since the unsworn statement is, under our proposals, given statutory recognition as evidence, such a prohibition would clearly apply only to the situation of the accused person who stands mute.

One of the major objections to the "formula" direction is that it denigrates the value of unsworn evidence in a statement when compared with sworn evidence. We consider it misleading to do this. It should be made clear to the jury that it must determine the weight which it considers the unsworn evidence is entitled to. We therefore recommend **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.** These are matters for the jury to decide. We note that this recommendation accords with that made by the Australian Law Reform Commission in its Interim Report on *Evidence* (see para 4.58).

it is recommended that **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.** Such a prohibition would preclude statements inviting the jury to speculate why the accused chose to remain silent or to make an unsworn statement. This would prohibit comment of the "what has the accused got to hide?" variety. The proviso would however allow appropriate comment, if, for example, the accused person made a false statement about his or her rights or the incidents of an unsworn statement or if a co-accused who gave sworn evidence commented upon an accused who did not. This latter aspect of the proviso reflects the existing law (see para 4.48).

4.69 It is recognised that to allow the jury to be informed about the accused's right to give evidence and yet to preclude certain types of comment upon his or her choice will result in the creation of "fine" lines.[60] Nevertheless the Commission (by majority) considers that certain prohibitions should be retained in the interests of consistency

and fairness to the accused. We do not consider it wrong in principle for legislation to contain provisions which give some guidance as to the manner in which trial judges should direct juries in criminal cases. We note that some cases have been overturned by the appeal courts where the transgression by the trial judge was clearly unintentional.[61]

D. The right of the Crown prosecutor to comment

4.70 One member of the Division (Mr Justice Roden) considers that there should be no legislative restriction at all upon the right of the Crown prosecutor to comment on the courses open to or the course adopted by the accused. In his view it is best to enable the prosecution to put such submissions as it thinks fit on the subject so that any issues relating to the choice taken by the accused can be fully and openly addressed. If the prosecution cannot do this and if the accused or counsel for the accused deal with the matter, either in the course of evidence or in address, it is left to the judge to give an appropriate direction: this can create an impression in the eyes of the jury that the judge is entering the fray by creating arguments in favour of the Crown's case. This interferes with the judge's proper role of putting the opposing cases fairly to the jury. The temptation upon the prosecution to make improperly inflammatory remarks would be curbed by the Crown prosecutor's general duty of fairness which is recognised and enforced by the courts, as well as by the fact that counsel for the accused will address later. In addition the court s own power to make appropriate remarks in the slimming up will serve as an adequate deterrent or remedy in the exceptional case that might arise when counsel for the Crown treats the matter unfairly.

4.71 The remaining members of the Division however, recommend that there should continue to be legislative restraint upon certain types of comment by the prosecution. This is the position prevailing in most jurisdictions where the unsworn statement is or was previously permitted. It is the recommendation made by the Australian Law Reform Commission in its Interim Report on *Evidence.* We are content to adopt its reasons:

> Great care would be required in commenting on the failure to give sworn evidence. The comment, consistently with the judge's power to avoid injustice, would have to avoid criticism of the accused for not giving sworn evidence and avoid suggesting in anyway that guilt may be inferred from the decision. Through lack of experience or excessive zeal prosecutors could easily go too far in their comments and could abort a trial that was reaching its conclusion The hazards of criminal trial procedure would be increased.[62]

4.72 As to the type of comment by the prosecution which the majority would wish to proscribe the traditional manner of expressing the prohibition has been in relation to "the failure of the accused to give (sworn) evidence" (s407(2) of the Crimes Act 1900). Consistent with the permitted "formula" judicial direction (cf para 4.50), the Crown prosecutor is allowed to refer to the fact that any statement was unsworn and that the accused was not subject to cross-examination, but he or she cannot refer to the fact that the accused who stood mute or made an unsworn statement had the option of giving sworn evidence. Of course our recommendation that the judge be permitted to inform the jury about the options available to an accused person (para 4.62) will mean that the jury will usually be made aware of such facts regardless of what the Crown prosecutor says. Despite this, indeed because of it, we consider that for the reasons given in the preceding paragraph it remains inappropriate that the Crown prosecutor should advert to such matters in the normal course. These reasons operate *a fortiori* to preclude comment canyassing the reasons for the accused electing not to give sworn evidence.

4.73 However the majority see considerable force in the reasons which it induce Mr Justice Roden to take the stance summarised in para4.70. In particular we perceive that there will be cases where it will be more appropriate for the prosecution to comment on the issue than to leave it to the trial judge. If, for example, an articulate and composed accused person made apparently untrue claims as to why he or she chose to make an unsworn statement it might be appropriate for something to be said on the matter other than by the trial judge. To cater for this type of situation the majority would allow comment to be made by the Crown prosecutor, with the leave of the court, if the matter is raised by or on behalf of one or more of the accused in the presence of the jury. We would envisage that, if such matter is raised in an unsworn statement or in sworn evidence given in the case, it would be appropriate for such leave to be sought prior to the Crown commencing its address. If the matter is first canyassed in the course of address on behalf of the accused it might be appropriate for leave to be given for the Crown to deal with the matter in reply.

4.74 We therefore recommend (by majority) that **the Crown prosecutor shall not comment on the fact that the accused person f ailed 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.** As in our earlier recommendations (para 4.68) "evidence" here includes material given by way of an unsworn statement.

VIII. SHOULD THE RIGHT TO MAKE AN UNSWORN STATEMENT BE EXTENDED TO SUMMARY TRIALS?

4.75 The issue is whether the right to make an unsworn statement should be extended to all courts exercising summary jurisdiction. As we noted in para 2.14, the Justices Act 1902 has been interpreted as precluding the right in summary proceedings before magistrates, although the Court of Appeal has recently suggested that, as a common law right, it applies to any other form of summary proceedings.

4.76 In Victoria and Tasmania the right extends to summary proceedings before magistrates, but this is not the case in South Australia. When the Victorian Law Reform Commissioner examined this subject in 1981 the discussions that he had with magistrates led him to the conclusion that the system operated successfully, and that there were no serious abuses of the right. The magistrates reported to him that if the unsworn statement were to be removed then the efficient operation of their courts would be affected and delays would result. The Victorian Law Reform Commissioner recommended in 1981 that this right should be retained.[63] "The Australian Law Reform Commission in its interim Report on *Evidence* reviewed this area of the law. It proposed that the right to make an unsworn statement should be available in all criminal trials.[64]

4.77 The main argument raised against extending the right to summary proceedings is that the factors that justify reception of evidence from an accused person by means of an unsworn statement only apply to the trial of serious criminal cases before juries. It is also, somewhat cynically, put that magistrates are so unlikely to be impressed by unsworn evidence that it is unhelpful indeed dangerous in the case of unrepresented accused to offer the option in such proceedings.

4.78 From our experience the current practice in Local Courts in New South Wales is inconsistent. Some magistrates will give the opportunity to an accused person (probably if unrepresented) to put material before the court in a contested case without requiring him or her to be sworn. Other magistrates do not adopt this practice. We consider this inconsistency to be undesirable.

4.79 We recommend that **the right to make an unsworn statement should be extended to summary proceedings.** This recommendation is made for the following reasons:

The general arguments in favour of retaining the right apply in relation to summary proceedings before magistrates although their weight is diminished by the matters adverted to in para 4.77.

Major amendments to the Crimes Act 1900 in 1974 and 1983 have extended the jurisdiction of Local Courts so that they now can hear, with the consent of the accused persor a vast range of very serious criminal offences. It is undesirable that an accused person should be discouraged from opting for a summary trial because the procedures before a magistrate are, in his or her view, less accommodating.

It is desirable to ensure greater consistency between the practices of the courts conducting trials on indictment and those of summary jurisdiction This principle is indeed reflected in s79 of the justices Act 1902.

If the right to make an unsworn statement is abolished in South Australia (para 3.1 1), there would be some merit in having uniformity in the position of those courts which retain the right. It is available in summary proceedings in Victoria and Tasmania and a similar proposal has been made by the Australian Law Reform Commission for the courts affected by its Interim Report.

FOOTNOTES

1. See Australian Law Reform Commission Interim Report on *Evidence* (1985) para 586.

2. The reasons for its retention are persuasively argued by the Australian Law Reform Commission note I above, paras 11-15.

3. *Hansard,* House of Lords, 14 February 1973, p1612.

4. Submission made by Mr J Dowd, MP.

5. An accused who chooses to offer no explanation before or during the trial to account for evidence pointing to his or her implication in the offence charged may legitimately be made the subject of comment by both prosecutor and judge to the effect that no explanation has been offered: *R v Stojadinovic* [1973] 2 NSWLR 807: *R v George* (1981) 4 A Crim R 12.

6. Dr G D Woods QC. See also *Fraser v The Queen* 119841 3 NSWLR 212 at 224-5.

7. As some of those who made submissions argued.

S. See further Australian Law Reform Commission note 1 above, vol 1 pp 321-322. See also note 5 above.

9. This view is advanced by Mr Justice Beach Unsworn Statements in Criminal Trials, Nov 1981 *Police Life* 4 and Mr justice Marks, “Thinking Up” about the Right to Silence and Unsworn Statements. (I 984) 58 *Law* Institute Journal 360.

10. Lord Widgery in *R v George* (1978) 68 Cr App R 210 at 211. per Lord Widgery CJ.

11. Mr J P Bryson QC.

12. Australian Law Reform Commission note 1 above, vol 1 p328 and draft Evidence Act s21(9).

13. Crimes Act 1900 s333.

14. See chapter 2, note 20.

15. See chapter 2, note 28

16. *R v Kelly* (1946) 46 SR(NSW) 344: *R v Penberthy* (NSW Court of Criminal Appeal 26 October 1978)

17. Mr R N Madgwick QC.

18. Australian Law Reform Commission. note 1 above, vol 1 p327.

19. Id, vol 2 p25.

20. Id, draft Evidence Act, s21(5)

21. The second part of that para.

22. Crimes Act 1900 s4O9C.

23. *R v Wyatt* 119721 VR 902 at 910.

24. (1932) 32 SR(NSW) 363.

25. Id at 375. per James J.

26. Id at 375, per Dayidson J.

27. *R v* Wyatt 119721 VR 902.

28. Para 2.1 1 above.

29. Such evidence is strictly inadmissible although it is usually permitted without objection. Where however the unsworn statement of one accused person implicates a co-accused the latter is entitled to object to a question in sworn evidence such as: “Was what you said in your unsworn statement true?”: see *R v Attard* [1970] 1 NSWLR 750 at 754-5 per Walsh JA (passage quoted in para 19 of New South Wales Law Reform Commission, Unsworn *Statements of Accused Persons* (1980)).

30. It is customary but not mandatory that the accused person should be the first person to give sworn evidence,. *R v Lister* 119811 1 NSWLR 110.

31. Archbold, Criminal *Pleading Evidence and Practice,* 41 st ed Para 4-402.

32. Australian U, w Reform Commission note 1 above, vol 1 p327, draft Evidence Act s21(2), vol 2 p25.

33. The Australian Law Reform Commission deals with the topic. note 1 above. at chapter 36.

34 Chapter 2, note 25.

35. *R v* Ditton (1927) 44 WN (NSW) 87.

36. In its original form s407(2) prohibited comment even by a co-accused: see *R v Ellis* (1925) 37 CLR 147. The section was amended in 1926 to allow comment by a co-accused subject to the proviso referred to in the next sentence of the Report.

37. (1918) 25 CLR 113.

38. (1911) 13 CLR 619 at 640-641.

39. New South Wales Law Reform Commission note29 above para74; *R v* Cormack (1979) 1A Crim R 47l; *R v Bell* (unreported, New South Wales Court of Appeal, 31 May 1985).

40. (1964) 118 CLR 600 at 617.

41. *R v Mason* (1924) 18 Cr App R 131 at 132; *R v Kerr(No* 2) 1195 11 VLR 239 at 247.

42. *Bridge v The Queen,* (1964) 118 CLR 600 at 616.

43. 11 8941 AC 650. See *Bataillard v The Queen* (1907) 4 CLR 1282 at 1289-1290 per Isaacs J.

44. *Bataillard v The Queen* (1907) 4 CLR 1282 at 1291, per Isaacs J.

45. Eg *Bridge v The Queen* (1964) 118 CLR 600 where the High Court divided 3:2 on the propriety of a particular Summing up.

46. *Bridge v The Queen* (1964) 118 CLR 600 at 611 per Windeyer J.

47. *R v Thomas* (1957) 57 SR(NSW) 292.

48. *Bridge v The Queen* (1964) 118 CLR 600 at 605 per Barwick CJ; *R v Bell* (unreported) New South Wales Court of Appeal 31 May 1985.

49. [1981] 2 NSWLR 469.

50. Id, at 461-2.

51. ld, at 4 7 3.

52. Ironically, the decision of the Court of Criminal Appeal in *R v Greciun-King* recentlv returned to haunt His Honour Judge Sinclair who was the trial judge in that case. In *R v* Fuller (16 September 1985 unreported) His Honour discharged a jury after six weeks of a trial on the joint application of the Crown and the accused. A court attendant was asked by a juror “will the defendant go into the witness box?” to which he responded “He has the option of an unsworn statement from the dock or to give sworn evidence from the witness box or neither”.

53. See eg *R v Simic* [1979] VR 497; R *v Perceval* [1981] VR 624; *R v* Dutton (1979) 21 SASR 356 and *Cross on Evidence* 2nd Aust ed para 15.6.

54. Australian Law Reform Commission note 1 above, vol 1 pp 329-33; vol 2 pp 25-26.

55. *Pemble v The Queen* (1971) 124 CLR 107 at 1 18 per Barwick CJ. See also R v *Gidley* [1984] 3 NSWLR 168 at 180-1 and cases there cited.

56. Note 51 above.

57, (1952) 85 CLR 4; 7 at 466. See also Commissioner for Road Transport and *Tramways v Preraver* (1950) 50 SR(NSW) 271 at 277 per Owen J.

58. See G Williams, *The Proof of* Guilt pp 59-62.

59, *See Cross on Evidence* 2nd Aust ed para 15.6.

60. *Cf Bridge v The Queen* (1964) 118 CLR 600 at 605 per Barwick CJ. See para 4.54 of this Report.

61. *R v McMillan* (1967) 87 WN(Part 1) 387 at 396.

62. Australian Law Reform Commission note 1 above, vol 1 pp330-331.

63, Minogue Report, *Unsworn Statements* in Criminal *Trials* (1981) paras 7.04-7.06.

64. Australian Law Reform Commission, note 1 above, vol 1 p331.

5. Some Matters of Practice

I. INTRODUCTION

5.1 In this chapter we consider a number of practical issues relating to unsworn statements which have been raised in submissions which we have received or in the reports of other law reform agencies. These issues are:

judicial control over the length of unsworn statements

the right to read an unsworn statement

the role of lawyers in the preparation and delivery of the statement

counsel's right to prompt the accused person

the use of terms suggesting an oath or affirmation-

II. LENGTH OF UNSWORN STATEMENTS

5.2 A number of people to whom we have spoken have raised the problem of unduly long unsworn statements being made by accused persons. There are no available statistics about the length of unsworn statements, but our experience is that they seldom exceed half an hour. There have been instances of statements ranging over several days[1] although this is exceptional. In comparison with the time involved in the prosecution case we do not consider that the practice of making lengthy unsworn statements is in fact a serious problem. Acknowledging that there are occasions when the right is abused in this as in other ways we consider that the means currently available to the trial judge are sufficient and preferable to any arbitrary or rigid rule to govern the length of the statement. These means are the right to prohibit irrelevant and inadmissible material (para 2.26) and the cout's inherent jurisdiction to control its own processes by ensuring that any steps in proceedings are not taken in such a manner as to constitute an abuse of process.[2]

5.3 As a means of keeping in check the length of court cases generally, the Chief Justice of New South Wales, Sir Laurence Street, has proposed the inclusion into the Evidence Act 1898 of a provision that would at once affirm the duty of judges to ensure that questioning of witnesses is relevant and not repetitive and at the same time confer on judges the power to enforce that duty. It is in the following terms:

Expeditious Disposal of Proceedings

(1) Where a judge considers it desirable in the interests of the expeditious disposal of proceedings in the court, commission or tribunal to which he or she belongs, he or she may by direction limit or restrict the time which may be taken by any party in addressing, in adducing evidence in chief, in cross-examining or in adducing evidence in reply and may by direction limit or restrict the subject matters or topics or the scope of

any subject matters or topics which may be canyassed in address, examination in chief, cross-examination or reply.

(2) Without limiting the width or exercise of the power conferred by this section a direction may be particular in limiting or restricting the time which may be taken or the scope which may be canyassed in respect of particular subject matters or topics or it may be general or it may be partly particular and partly general.

(3) The power conferred by this section may be exercised in any proceedings whether civil or criminal whether with or without a jury, and may be exercised at any stage of the proceedings whether before the commencement of or at the commencement of or during the currency of any hearing whether final or interlocutory within the proceedings.

(4) A judge may at any time and from time to time vary in any way or wholly vacate any direction under this section.

(5) The provisions of this section apply in proceedings in the Supreme Court, the Industrial Commission, the Land and Environment Court, the District Court, the Workers Compensation Commission and such other courts, commissions and tribunals as may by regulations under this Act be prescribed.

(6) In this section judge means a judge or member of the court or commission or prescribed member of the tribunal and includes a master or magistrate.

(7) The power conferred by this section may be exercised in any proceedings current when this section comes into force or commenced thereafter.[3]

This Report is not the place to discuss a provision which has such general application We merely note that it could be adapted to provide a means of control over the inordinately lengthy and dubiously relevant unsworn statement.

III. THE RIGHT TO READ AN UNSWORN STATEMENT

5.4 As we have already pointed out (para 2.29), an accused person has no right to read a prepared statement. The present practice is inconsistent[4] some judges will allow an accused person to read a proposed statement, others will not and others will simply allow the accused to use notes to prompt the memory. This discrepancy in practice is itself unsatisfactory since it has a tendency to create confusion as well as leading to inconsistent treatment of accused persons.

5.5 We consider that in most cases an accused person's statement will have a more favourable impact on the jury if it is delivered without reference to a document, since presentation by reading can be mechanical An accused person who reads a document, particularly if it is not wholly his or her own creation can also easily give the impression of reciting a text written by another rather than something that represents the accusers own case.

5.6 There are, however, cases such as trials for commercial fraud in which the volume of material that an accused person can legitimately put before a jury is so large as to make it unrealistic to present it without the assistance of an aid to memory. In current practice in New South Wales, this will usually mean prompting of some kind by counsel for the accused. Strictly there is little difference between such prompting and reference being made to written material. For this reason we suggest that reading of a statement should be allowed but it should not be done as a matter of course. In cases in which the defence involves the accused making a long statement or in any case in which the accused person appears to have exhausted his memory and to have

forgotten something which he wishes to put before the jury, we would anticipate that leave would be granted. We see no difficulty in leaving this practice to the discretion of the trial judge to be exercised as he or she thinks fit in the circumstances of the case.

IV. THE ROLE OF LAWYERS IN THE PREPARATION AND DELIVERY OF THE STATEMENT

5.7 We consider that the current law and practice relating to the role played by counsel in the preparation of a statement intended to be made by an accused person should not be changed. The role of barristers in this procedure is adequately provided for by the rules of ethics which guide the practice of that profession Rule 55 of the New South Wales Bar Association Rules provides:

> A barrister is entitled to assist an accused person in preparing any statement to be made by that person from the dock and may, form material provided by Such person draft such statement provided that the accused person before he delivers the statement acknowledges to the barrister that he understands and agrees with the contents thereof.

From the investigation we have conducted on this issue, we are satisfied that the role of lawyers in preparing statements is entirely proper in the vast majority of cases. None of the many submissions which we received suggested otherwise. The lawyer does not make up the statement for the accused person-it is based on the instructions given by the accused person and contains the material which the lawyer believes most effectively presents the case on behalf of the accused person.

5.8 We note that the Australian Law Reform Commission in its Interim Report on *Evidence* has recommended that counsel, with leave of the court-should be permitted to read the statement where the defendant is unable to do so.[5] In our view this would be undesirable in that it would be likely to blur the distinction between the lawyer's role as advocate and that of witnesses who give evidence in the case.

V. COUNSEL'S RIGHT TO PROMPT THE ACCUSED PERSON

5.9 We consider adequate the current law and practice of the courts which entitles the lawyer who appears for the accused person to remind his or her client of matters which were not covered by the statement (see para 2.29). It would in our view be desirable that such prompting should occur in the presence of the jury and that it should be done overtly so that the jury and the judge are not prevented from hearing the terms of the prompting. They are thereby able to more fairly assess the weight that they consider should be attached to the material that is presented in response to the prompting. However the matter does not in our view warrant legislative intervention.

VI. THE USE OF TERMS SUGGESTING AN OATH OR AFFIRMATION

5.10 From time to time there have been instances of accused persons saying words such as “This is the trutk the whole truth and nothing but the truth” as part of an unsworn statement. In one case reported to us, the accused produced a bible from among a collection of books and began “I swear by Almighty God...” before being stopped by a firm judicial expostulation. We do not consider that it is necessary to recommend any specific rule to cope with this situation. Our proposal that the judge should be required to inform the jury of the various options available to the accused will give the judge sufficient scope to deal with such a situation as the need arises. In particular, the judge will be able to inform the jury that the accused has not taken an oath or affirmation and explain the procedures by which that could be done. We anticipate that this misleading practice, engaged in by only some accused persons, will become a thing of the past.

FOOTNOTES

1. John Stonehouse’s unsworn statement lasted five days: New South Wales Law Reform Commission Discussion Paper, Unsworn *Statements by Accused Persons* (1980) para 79.

2. *Tringali v Stewardson Stubbs & Collett Ltd* (1966) 66 SR(NSW) 335 at 344: *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536.

3. Annexure to a letter to the Attorney General of New South Wales dated 8 February 1984. We gratefully acknowledge the Chief Justice’s permission to use this material.

4. The inconsistency apparently derives from different approaches taken by trial judges to R *v Sheehan* [1926] SASR 243. *R v Ross* (1895) 6 QLJ 261 and *R v Stuart* [1959] SASR 144, 101 CLR 1 at 7-8.

5. Australian Law Reform Commission Interim Report on *Evidence* vol 1 p327, vol 2 p25.

Appendix A - Select Bibliography

I. Books

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South Australia

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United Kingdom

Royal Commission on Criminal Procedure - *Report* (HMSO, London. 1981).

Appendix B - Portion of Letter Outlining Various Options for Reform

As presently advised, The Commission sees the major options as:

1. Retain the existing law and practice and extend it to summary proceedings

2. Retain the existing law and practice

3. Retain the right with changes:

    (a) For certain crimes only

    (b) for unrepresented accused only

    (c) allow cross-examination after the accused has had an uninterrupted “say”

    (d) exclude the cumulative right to make a statement and give sworn evidence

    (e) require the accused to submit a draft statement in writing to enable the trial judge to direct the exclusion of inadmissible or otherwise improper material in advance

    (f) allow the judge to comment on the accused's failure to give sworn evidence with or without statutory prescription of nature of comment

    (g) require the judge to inform the accused in *the presence of the* jury of his or her alternative rights

    (h) allow the judge to explain to the jury the accused's alternative rights (without comment):-

        only if jury asks (cf *R v Greciun-King* [1981] 2 NSWLR 469); or

        in all cases

    (i) allow the prosecution to comment on the accused's failure to give sworn evidence with or without statutory prescription of nature of comment

    (j) provide that the accused loses the right of last address if he or she makes an unsworn statement.

4. Abolish the right to make an unsworn statement.

5. Abolish the right with safeguards:

    (a) standard form of judicial comment

    (b) power to allow particular accused to make unsworn statement

    (c) prohibit certain lines of cross examination (cf s413A of NSW Crimes Act)

    (d) statutory requirement, if objection is taken, for the judge to curb unfair cross-examination.

In addition there are a number of incidental matters regarding the practice of making an unsworn statement that require clarification These include:

(a) the right to read/ prohibition on reading

(b) the right to tender exhibits “proved” merely by unsworn statement/prohibition of same

(c) the courts power to control inadmissible material (cf s409C of NSW Crimes Act and 3(e) *supra)*

(d) counsels right to prompt or remind

(e) counsel's role in assisting in preparation of statement

(f) the evidentiary status of the statement including availability for or against co-accused

(g) co-accused's right to cross-examine another co-accused who makes an unsworn statement (cf 405(l) of NSW Crimes Act)

(h) the Courts power to limit the length of an unsworn statement

(i) the right to make an unsworn statement relating to sentence and its status

(j) the apparent anomaly created by s413A which allows a person who makes an unsworn statement to attack the character or credibility of a prosecution witness with impunity but denies that privilege to an accused person who gives evidence.

Appendix C - Submissions Received

Adams, Mr M F
Bell, His Honour Judge HH

Blanch Mr RO, QC

Brown Mr D

Bryson Mr JP, QC

Burgess, Mr P

Clark Mr P H

Coombs, Mr J, QC

Council for Civil Liberties

Court Support Scheme, Association of Civil Rehabilitation Committees of New South Wales

Cowdery, Mr NR

Dawe, Mr W G

Denton, His Honour Judge WH, QC

Donovan, Mr BHK

Dowd Mr J, MP

Dunford Mr JR QC

Finnane, Mr MJ, QC

Flood, Mr SA

Glass, The Honourable Mr Justice HH

Gleeson Mr AM, QC

Healey, Mr TM

Howie, Mr RN

Joseph Mr MJ

Kelly, Mr T

Kirby, The Honourable Mr Justice MD

Kitson, Mr F

Knoblanche, His Honour Judge EP, QC

Lee, The Honourable Mr Justice JA

Loveday, His Honour judge RF, QC

MacGregor, Mr MA, QC

Madgwick, Mr RN, QC

McGuire, His Honour Judge JC

Miles, Mr BR

Murray, Mr KR, AO, OBE, ED, QC

Nash, His Honour Judge EAM

Neil, Mr MJ

New South Wales Bar Association

New South Wales Society of Labor Lawyers

Norrish Mr SR

Nyman, Mr TW

Purnell, Mr HF, AM, QC

Reynolds, Mr RG, QC

Roach Mr BL

Rogers, The Honourable Mr Justice AJ

Sexual Assault Committee, Women's Co,-ordination Unit

Shadbolt, His Honour Judge KP

Shields, Mr EJ, QC

Shillington, His Honour Judge DS, QC

Sides, Mr ML

Sinclair, His Honour Judge JB, QC

Slattery, The Honourable Mr Justice JP

Smith, Mr T

Smyth, His Honour Judge JG, QC

Staunton, His Honour Judge JH, CBE, QC

Stein, The Honourable Mr Justice PL

Sully, Mr BT. QC

Swan Mr JM

Sweeney, Mr PH

Thorley, His Honour Judge BR

University of New South Wales Law School, Criminal law and Litigation Teachers

Williams, His Honour Judge MJ

Woods. Dr GD, QC

Yeldham, The Honourable Mr Justice DA